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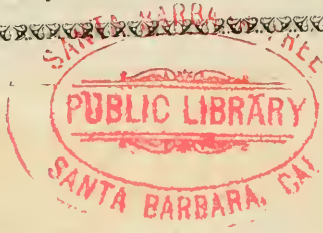
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BY
FRANCIS HILLIARD,
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AUTHOR OF THE LAW OF MORTGAGES, ETC.

IN TWO VOLUMES.

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P R E F A C E .

MANY years ago, I conceived the design of preparing an extended view of *The American Law of Real Property*, and accordingly compiled the Treatise or Abridgment, the last edition of which bears that title. That work was modelled substantially upon the approved Digest of Mr. Cruise, which had long been used as the popular text-book upon this subject. In the preface I took occasion to remark, that, in consequence of the disuse of many feudal doctrines, which our ancestors left behind them in emigrating to this country; the gradual adaptation of our law to the republican institutions here established; and, above all, the numerous and various statutory enactments in the different States of the Union;—the English Law of Real Property and the American Law of Real Property had come to be two distinct systems, requiring, of course, to be stated and explained in distinct elementary works.

While the valuable Digest of Mr. Cruise had been the approved manual of the American lawyer, upon those branches of the general law of Real Property, which alone he assumed to treat; another portion of this extensive subject was then, and has been ever since, occupied by another work of equal merit and popularity, to wit, *Sugden on Vendors and Purchasers*. The line of division between these two works is very marked and apparent. The former treats of *the title* to Real Property; the modes of acquiring such title, and the incidents, rights, and liabilities which appertain to it, after it is acquired; while the latter is restricted in plan, though not always in execution, to *executory contracts* of sale and purchase, by which, when carried out, the title will of course be changed, but which in themselves effect no such change. English law and American law are less *divergent* upon the latter than upon the former class of subjects; and indeed their discrepancy in reference to mere executory contracts concerning real property results chiefly from the different rules which prevail as to real property itself. Thus *estates tail* have been substantially abolished in the United States; and, although there is no legislation immediately relating to *contracts of sale and purchase*, which by way of title to the property sold involve the nice points of entailment; still the one change necessarily involves the other, and upon both subjects alike virtually supersedes those intricate and subtle distinc-

tions, which have given occasion to so many decisions in the English Courts. The same may be said of the obsolete titles of *Fine and Recovery*, *Tithes*, *Advowson*, *Copyhold*, &c.; and to some extent of those other numerous subjects—such as *Dower*, *Descent*, *Devise*, *Execution*, &c.,—which have not themselves become obsolete in our law, but the rules and principles of which have been so extensively and vitally modified by American statute and usage.

There are moreover many points of mere *practice*, in suits relating to the title of real property sold, more especially suits in Equity; which are peculiar to the English Courts, and may well be very cursorily noticed in an American treatise.

Upon the whole, therefore, I may state, that the present work is designed to occupy the same ground in American law, which has been so successfully occupied in the English law by Sugden on Vendors and Purchasers. I mean the same ground for mere practical use; for, as I shall presently explain, this is the prevailing purpose of the book; and I do not profess to have imitated the free discussion, independent criticism, acute comparison of authorities, and flowing style of expression, which have made that work so popular and so worthy of the fame of its distinguished author. Without, for the most part, undertaking to weigh and balance conflicting decisions, or to pursue the fine threads of distinction which run through opposing cases

and opinions; I have endeavored to present in a compact form *the law as it is*, in the shape of the English and American authorities; usually accompanied, where there is a serious conflict in the cases, with a general expression of opinion as to the prevailing rule upon the particular topic of discussion. It has always seemed to me peculiarly impracticable, in an American text-book, for the writer to advance any proposition of his own, as in the nature of the "*responsa prudentum*" of the Roman law; or in other words as *the law*, authoritatively eliminated from the opposing cases; because, in each of the United States of America, the decisions of its own Court are the controlling rule; and if, in a treatise designed for national use, the author should deduce an oracular conclusion from the concurring cases in a majority of the States on one side, that conclusion would not be law in the minority of States, whose Courts agree on the other side. While, therefore, the highest respect is due to the private opinion of such a writer as Sir Edward Sugden and many of our American commentators, upon any controverted point; it is after all but an opinion, the value of which in any particular locality is best tested by a summary statement of the decided cases upon which it rests.

Although the subjects treated are substantially the same as those in Sugden, the plan and arrangement are wholly different, and, as I venture to suggest, more intelligible and appropriate. I begin with the distinction

between executed and executory contracts; and proceed to explain what is necessary to constitute a contract, its consideration, parties, construction, and form—including sales by auction, the Statute of Frauds, license, and part-performance. Then follow the Time of performance, the Title to the property sold, and, in natural succession, partial failure of title, and the general grounds for avoiding or rescinding a sale, in whole or in part, whether for total or partial want of title, for non-payment of the price, or other causes; including Mistake, Fraud, the sale of Expectancies, breach of Trust, and Notice. Having completed my view of the rights and liabilities growing out of the contract, I proceed to the subject of the Remedies for enforcing it; first in Equity, including the extensive subject of Specific Performance, and then promiscuously in Law and Equity, including, in more minute detail than before, the title which the vendor must show, and the grounds of objection which may be made against it; the dependence or independence of the mutual covenants of the parties; actions to recover back the price paid, and defences against notes and other securities given therefor; the claim for Use and Occupation, Damages, Pleading, Parties, and miscellaneous points of practice. I close with an Appendix, somewhat similar to that found in Sugden, containing some of the most recent decisions upon the prominent topics of the work, stated very much more in detail than is done in the work itself, and generally contain-

ing a useful abstract of the earlier cases upon the same subjects.

Expressing my thanks to the profession for their favorable reception of my previous works upon the Law of Real Property and upon Mortgages, I submit the present work to their candor and kindness.

FRANCIS HILLIARD.

Boston, February, 1858.

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LAW OF VENDORS AND PURCHASERS.





THE LAW OF VENDORS AND PURCHASERS.

CHAPTER I.

NATURE OF THE CONTRACT FOR A SALE AND PURCHASE OF LANDS.

1. Distinction between the executory contract, and a transfer in pursuance of it; merger, &c.

7. Right of property and possession, at law.

13. Doctrine *in equity*; whether a title passes.

15. Whether the purchaser has a *descendible and devisable* interest; application of funds; revocation and republication of will, &c. Devise by a *vendor*, and the effect thereof.

40. *Reforming* a deed, for variance from the previous contract.

1. THE law uniformly recognizes the obvious distinction between the contract of *purchase and sale*, (a) which is a

(a) An agreement to *devise* real estate has been held valid. *Mundorff v. Howard*, 4 Md. 459. See *Radnor v. Shafto*, 11 Ves. 447. A., being in treaty for the purchase of land, offered for sale by B., was informed by C. that he had a claim to it. C. also inserted in a newspaper an advertisement, cautioning all persons against purchasing; and caused to be recorded a bond of B., binding himself not to revoke a will, in which he had devised the land to the wife of C., which bond was also shown to A. before he had concluded the purchase. Held, these circumstances were sufficient to constitute A. a purchaser with notice, notwithstanding, having seen the will, he had discovered a misrecital of it in the bond, and was advised that he might safely purchase. *Argenbright v. Campbell*, 3 Hen. & M. 144.

mere *executory agreement*, giving to each party a valid *claim* against the other, but neither transferring nor vesting *any present title*; and an *actual conveyance* of the property between grantor and grantee. (a)

2. Thus a vendor and vendee are said not to stand in the relation of *mortgagee and mortgagor*.¹ (b)

3. So it is held, in general, that, as agreements for the sale of lands are *executory contracts*, the acceptance of a deed, in pursuance of a contract, is *primâ facie* an execution of the agreement, which thenceforth becomes void, and of no further effect;² except, as is said, in case of a covenant, which does not look to, nor is connected with, the title, possession, quantity or emblements of the land.³ (c)

¹ Kirby v. Harrison, 2 Ohio, (N. S.) 326.

² Bull v. Willard, 9 Barb. 641; Jones v. Wood, 16 Penn. 25.

³ Ibid.

(a) Action upon the following writing, signed by both parties: "This certifies, that I have sold to" the plaintiff "about five acres of land, more or less, being the same which I bought of him in consideration of the same sum which I paid him for the same, with interest from the time I purchased the same, till I paid for it (supposed about six months) with the expense of the deed, also the taxes for one year." Held, an *executory contract* for the sale of the land. Atwood v. Cobb, 16 Pick. 231.

(b) But it has been held, that where lands are sold by a bond or covenant, conditioned to make title upon payment of the purchase-money, and expressly reserving the title to the vendor, till such payment; the effect is the same as that of a conveyance and mortgage back;—the vendor retains a lien for the price, even as against subsequent purchasers or incumbrancers, with notice. Moore v. Anders, 14 Ark. 628.

(c) Upon the same principle, a bond or written agreement for conveyance merges all prior *parol agreements and negotiations*. Bullett v. Worthington, 3 Md. Ch. 99; Parkhurst v. Van Cortlandt, 1 Johns. Ch. 273. But where a vendor pointed out to the agent of the vendee two fractions, when showing him a tract offered for sale, represented them as valuable, and gave a written description of the improvements on the fractions to be submitted to the vendee, and the agent understood that the whole tract was offered, and possession of the fractions with the tract was delivered to the vendee, but they were omitted in the deed; it was held that the fractions were included in the sale. Barraque v. Siter, 4 Eng. 545.

4. So, the purchaser of the interest of a party, under a mere executory contract, is presumed to buy with notice of, and subject to, the legal title.¹

5. A covenant, upon the principle above stated, in an agreement to sell and convey land, that it shall be "free and clear of all incumbrances," is merged in the subsequent deed, and the grantee can claim only under the covenant in such deed. So, though the agreement and the deed are made by different parties.²

6. Agreement for the sale of land, the price to be paid "as soon as it can be ascertained that the title to the premises is good and unincumbered." Held, the purchaser is bound to examine the title before taking his deed, and cannot afterwards claim under the agreement.³

7. So an executory contract does not, *at law*, pass a title to the property.

8. Bond to convey, on payment of a certain sum. The obligee built a house on the land, without any agreement for its removal, and paid part of the price, and, to protect the property from his creditors, for an inadequate consideration, assigned the bond to his son. In the mean time, some of the creditors had attached the house, and caused it to be sold as personal property; and, with full notice of the facts, took a conveyance of the land from the obligor. . Held, before the assignment of the bond, the obligee had no attachable interest in the land; that the house was real estate; and that the son, on tender of the balance due and demanding performance of the bond, might maintain a bill in equity against the obligor and the creditors for specific performance.⁴

9. So, under a naked contract of purchase, which is silent on the subject of possession, the purchaser acquires no right to possession or entry; and, if he enter in pursuance of a parol license from the vendor, the possession is an interest

¹ Fosgate v. The Herkimer, &c. 12 Barb. 352.

² Carr v. Roach, 2 Duer, 20.

³ Ibid.

⁴ Murphy v. Marland, 8 Cush. 575.

distinct from that acquired under the contract, and is subject to sale on execution.¹

10. And possession under an executory contract will not render the contract valid, if otherwise void for illegality.

11. Where a colonist, having a grant of land in Texas, contracted to sell it before the expiration of six years after receiving his grant, and to make a full conveyance as soon as the law would permit, and the purchaser went into possession at the time of the contract, and made valuable improvements, such contract being contrary to law; held, it was void, and could not be enforced.²

12. An agreement stated the sale of certain lands, and the vendor covenanted for himself, his heirs, &c., to convey so much of them as he held the legal title of, to the vendee, his heirs, &c., by a certain time, with general warranty, and to procure a third person to convey such parts as he was legally entitled to, to the vendee, his heirs, &c., by a certain subsequent time, with special warranty. Held, only an ordinary bond for a conveyance, which passed a mere equitable estate.³

13. But, *in equity*, a contract of sale of land is not merely executory, but the vendee becomes *the owner*, (a) and the vendor is seised *in trust* for him; which trust attaches to the land, and binds all who claim under the vendor with notice.⁴

14. So, an article of agreement, under seal, for the purchase of land, is not a mere chose in action, but an interest in the land, which is within the provisions of the recording

¹ Kellogg v. Kellogg, 6 Barb. 116.

² Hunt v. Robinson, 1 Texas, 748.

³ Lafferty v. Whitesides, 1 Swan, (Ten.) 123.

⁴ Linseott v. Buck, 33 Maine, 530.

(a) So it has been held, that payment and entry vest even a *legal title* in the party who holds a bond for titles, which he may enforce by an action at law. Hence, equity will not interpose by injunction, though the obligor has threatened to sell the property, or entered and carried off the crops. *Peter-son v. Orr*, 12 Geo. 464.

acts, and the interest of the vendee may be bound by judgment. So, where the vendee, after paying part of the purchase money, and being in possession, assigns all his right and interest in the contract to a creditor as collateral security, such assignment is but a mortgage, and, if not duly recorded, will be postponed to subsequent judgments.¹

15. Upon the same principle, by a general *devise*, an estate passes, in which the deviser has acquired an equitable title by a contract of purchase;² more especially where a written agreement for the purchase of an estate *has been executed*.³

16. So, an equitable title, acquired after a general devise, passes by republication of the will.⁴

17. In such cases, the vendor is regarded as a *trustee* for the vendee.⁵

18. A third person articted to purchase lands in trust for the testator, who, before any conveyance by will, disposed of all his freehold estate. Held, the lands articted for passed by the will.⁶

19. Before the making of a will, the ancestor of the testator had contracted for the purchase of an estate, of which possession was given, but no conveyance executed. The purchaser then died intestate, leaving the testator his heir at law and sole next of kin. The testator then made his will, and afterwards the estate was conveyed to him. Held, the estate was not after-acquired property, but included in the devise.⁷

20. One possessed of three species of estates in the county of H., viz: one by articles wholly executory, another executory in part, and a third (being an advowson) completely executed by a recent conveyance, devises to his wife as follows: "All the manors, messuages, advowsons, and hereditaments in the county of H., for the purchase whereof I have already contracted and agreed, or in lieu thereof the

¹ Russell's Appeal, 15 Penn. 319.

² Broome v. Monck, 10 Ves. 597; Potter v. Potter, 1 Ves. 437; Davie v. Beardsham, 1 Cha. Cas. 39; Milner v. Mills, Mose. 123; Capel v. Girdler, 9 Ves. 509. See Vernon v. Vernon, 7 E. 8.

³ Rose v. Cunynghame, 11 Ves. 550.

⁴ Broome v. Monck, 10 Ves. 597.

⁵ Darris's case, 3 Salk. 85.

⁶ Greenhill v. Greenhill, 2 Vern. 679.

⁷ Marston v. Roe, 8 Ad. & Ell. 14.

money arising by the sale of my real estate in the county of L.;" (with directions for completing the contracts.) Held, the advowson shall pass.¹

21. The same general principle has been applied to the question of an implied revocation of a will, by subsequent marriage, and birth of children.²

22. The same rule of equity sometimes involves the question, as to the fund, making part of the estate of the testator, from which purchase-money shall be paid.

23. Upon the principle above stated, the devisee or heir of a purchaser may call for application of the personal estate in payment for the land.³ But the liability of real and personal representatives, in respect of such contract, is regulated by that of the party at his death. If he could not be compelled to take the estate, the heir cannot insist on having it, and that the personal estate shall pay for it.⁴ The administrators cannot assign the contract, or compel its performance, without consent of the heirs.⁵

24. A devisee, claiming the benefit of a contract for the purchase of an estate, directed to go to the uses of the will, the title of which proves defective, has no claim upon the personal estate; either to have the purchase-money, or another estate purchased, or the purchase completed notwithstanding the defect.⁶

25. A. makes a lease to B. for seven years, and on the lease is indorsed an agreement, that if B. shall within a limited time be minded to purchase the inheritance for £3,000, A. would convey to him for that sum. B. assigns to C. the lease and the benefit of this agreement. A. dies, and by will gives all his real estate to D. and all his personal to E. and D. equally. Within the limited time, but after the death of A., C. claims the benefit of the agreement from D., who accordingly conveys to C. for £3,000. Held,

¹ *St. John v. Bishop*, &c. 2 Bl. 930; ⁴ *Broome v. Monck*, 10 Ves. 597.
² *Cowp.* 94. ⁵ *Champion v. Brown*, 6 Johns. Ch.
³ *Marston v. Roe*, 8 Ad. & Ell. 14. 398.
⁶ *Broome v. Monck*, 10 Ves. 597; *Broome v. Monck*, 10 Ves. 597.
Milner v. Mills, Mosc. 123.

this sum, when paid, is part of the personal estate of A., and E. is entitled to one moiety of it as such.¹

26. The doctrine, that a party claiming under a will cannot dispute any of its provisions, but must elect to affirm or repudiate it *in toto*, has been applied to the devise of land merely contracted for.

27. Will, directing that in case the testator shall enter into contracts for the purchase of lands, and die before the conveyance, such contracts shall be carried into execution, the money paid out of his personal estate, and the conveyance be to his trustees, their heirs, &c., to the uses of his will. Held, the heir at law, having interests bequeathed to him, is put to an election.²

28. A similar doctrine has been applied to the title of a *rendor* of lands, as affected by a devise thereof. Thus, where one devises land, and afterwards articles, for valuable consideration, to sell or settle them, this in equity is a revocation of the will; as much so as a conveyance would be at law. Whether the abandonment of the contract would set up the will again, without republication, has been questioned.³

29. On the other hand, if the owner of an equitable fee devises it, and afterwards the legal fee is conveyed to him, the will is not thereby revoked, because such conveyance was incident to the equitable fee devised. But, if he afterwards take a qualified conveyance of the legal fee, for the purpose of preventing dower, it is a revocation, being a change in the quality of the estate, and not incident to the equitable fee.⁴

30. If, after a devise of all one's real and personal estate, he articles to purchase lands, and then dies, they pass to the heir. Had the articles been made before the will, the estate would have passed by it.⁵ So, a testator entered into a contract for the purchase of an estate, and the vendor agreed to

¹ Lawes v. Bennett, 1 Cox, 167.

³ Bennett v. Lord Tankerville, 19

² Thellusson v. Woodford, 13 Ves. 209.

Ves. 170.

⁴ Ward v. Moore, 4 Madd. 368.

⁵ Langford v. Pitt, 2 P. Wms. 629.

convey to the purchaser, his heirs, appointees, or assigns. Subsequently to the contract, the purchaser made a codicil, by which, after reciting the contract, he devised the estate to his executors and trustees, upon the trusts therein mentioned. He afterwards took a conveyance from the vendor, to the usual uses, to bar dower. Held, the conveyance operated as a revocation of the devise.¹

31. A testator devises all his freehold and copyhold manors, &c., and real estate whatever, upon certain trusts ; and gives to the same trustees a sum of £35,000 to lay out in the purchase of lands, to be settled upon the same trusts. He afterwards contracts for the purchase of several estates ; and by a codicil, specifying some of the estates which he had so contracted to purchase, devises them to the same trustees, upon the trusts of his will, and directs that the purchase-moneys shall be taken as part of the £35,000 ; confirming his will in all other respects. Held, the codicil amounts to a republication of the will, so as to pass, not only the estates therein specified, but all the estates contracted for.²

32. But, on the other hand, it has been held, that an estate which the testator had contracted to *sell*, will pass by a devise of all his real and personal estate to trustees, in trust to sell.³

33. A testator, having devised freeholds and copyholds to the same persons, afterwards executed a marriage settlement, by which he bargained and sold the freeholds to trustees and their heirs, to the use of himself during his life, and after his death, to the intent that the wife might receive annually a rent-charge, which was secured by powers of distress and entry, and by a term of years ; and subject to the rent-charge and the term, to the use of the settlor, his heirs and assigns ; and covenanted to surrender the copyholds to the uses of the settlement. The testator died, leaving his wife surviving, without having surrendered the copyholds. Held, the cov-

¹ Bullin v. Fletcher, 1 Kec. 369.

² Hulme v. Heygate, 1 Mer. 285.

³ Wall v. Bright, 1 Jac. & Walk. 494.

enant to surrender did not operate as an entire revocation of the devise of the copyholds, but only so far as the particular purposes of the settlement required.¹

34. A testator devised all his real estates to his children, equally, and afterwards entered into contracts for a sale, but died before they were completed. The purchasers afterwards abandoned their contracts, because they were unable to procure a conveyance from some of the devisees, who were infants. Held, though the contracts were properly abandoned, the will was revoked.²

35. Agreement for the sale of an estate at a future time. Before that time, the vendor died intestate. Held, the rents accrued between the vendor's death and the time fixed belonged to his heirs.³

36. A testator devised his estates to trustees, in trust to sell, their receipts to be sufficient discharges; and directed them to complete any contracts for sale remaining incomplete at his death. Held, his executor was the proper party to give receipts for the purchase-moneys of such estates.⁴

37. So the title of a purchaser passes *by descent* to his heirs.⁵

38. Although a purchaser, before the conveyance, has neither a legal nor equitable right *as against the seller*, until he pay the purchase-money; yet, upon the same principle of *equitable ownership*, his equitable estate is subject to his control, and to the lien of judgments obtained against him.

39. But Equity will order an injunction against cutting timber, by a person having got possession under articles to purchase.⁶

40. Although, as a general rule, a mere agreement of sale and purchase is merged in the actual conveyance, yet, by a well-established principle of Equity jurisprudence, the Court

¹ Vawser v. Jeffery, 3 Russ. 479.

² Tebbott v. Voules, 6 Sim. 40.

³ Lumsden v. Fraser, 12 Sim. 263.

⁴ Eaton v. Sanxter, 6 Sim. 517.

⁵ Broome v. Monck, 10 Ves. 597.

⁶ Crockford v. Alexander, 15 Ves. jun. 138; Baldwin v. Belcher, 1 Jo. & Lat. 18.

will correct a mistake (a) in a written contract, if clearly shown, even by parol evidence. So, *a fortiori*, the Court will reform a deed, entered into under a previous agreement, by ordering a fresh conveyance ; from which a covenant will be expunged which was not contained in that agreement, or contemplated by the covenantor, even though such covenant was introduced by the attorney of the covenantor, (but without his express authority.)¹

41. Tenants in common agreed to make partition pursuant to an award, and executed deeds for that purpose. In the deed to the plaintiff, a tract assigned to him was omitted by mistake. The parties took possession according to their deeds. Held, the mistake should be rectified, and a specific performance of the contract decreed as to the tract omitted.²

42. E. (carrying on business under the name of W. Factory,) being indebted, proposed to his creditors in a writing, signed by his agent, as follows : " A deed of trust of all the property to be executed for the payment of such notes already given by said Factory," &c., as may be renewed for twelve months, payable afterwards in monthly payments. This proposal was accompanied by another paper, headed, State of Warren Factory, and included in its recitals, among other property, " Factory Pratt Street." It was accepted by some of his creditors, and a deed of trust executed. It appeared that the Factory Pratt Street, was situated on two lots of ground, which belonged as well to E. as his brothers and sisters ; but the deed of trust, in which the brothers and sisters united, by mistake of all parties omitted one of those lots. Before the discovery of this mistake, two creditors obtained judgments at law, one before, and one after, the trustees took possession. Bill to reform the deed, add the omitted lot, and enjoin the creditors from pro-

¹ Rob v. Butterwick, 2 Price, 190.

² Tilton v. Tilton, 9 N. Hamp. 385.

ceeding at law against that lot. Held, that the former creditor, not having notice of the original contract, might proceed at law; but the other, having received a dividend from the trustees, thereby became an equitable party to the deed, and could not enforce his judgment, in opposition to the agreement on which the deed was founded. Upon these principles, the deed was decreed to be reformed, in conformity with the original contract.¹

43. But Equity will not interpose to amend a written instrument, without the clearest and most satisfactory proof of the mistake, and of the real agreement, especially where the mistake is denied in the answer.² Thus the defendant, in writing, agreed to convey to the plaintiff, on payment of a certain sum, "a lot of land situated in the town of Windham." The plaintiff, alleging that there was a mistake in the contract, and that the whole of a particular lot was intended to be embraced by it, though a part of the lot lay in the town of *Westbrook*, brought his bill to have the mistake corrected, and specific performance decreed of the contract as amended. Held, parol evidence was inadmissible to vary the written contract.³ So, a bill to rectify a conveyance, alleged to have passed by mistake more than was included in a previous agreement, was dismissed; the conveyance reciting a more extended agreement, the parties being dead, the agent of the grantor having acknowledged the extended agreement, and the agent of the grantee, who could have given a personal account of the transaction, not having been examined by the plaintiff.⁴

44. A marriage settlement recited an agreement to convey a certain estate, save and except the lands of Ballyhenry and its sub-denominations, but the operative part of the deed purported to convey by name, as a separate denomination, the lands of Killahan, which, it was proved, were reputed a sub-denomination of Ballyhenry. Held, that there was not

¹ *Moale v. Buchanan*, 11 Gill. & J. 314.

³ *Elder v. Elder*, 1 Fairf. 80.

² *Lyman v. United Ins. Co.* 2 Johns. Ch. 630.

⁴ *Beaumont v. Bramley, Turn. & Russ.*

sufficient evidence of mistake to justify the Court in striking Killahan out of the settlement.¹

45. So, where a contract is entered into for the sale of an estate, and, under general words, property passes which the vendor insists he did not intend to sell, but the purchaser by his answer denies, or does not admit, that it was not in his contemplation at the time of the purchase; it seems, the vendor cannot sustain a bill against the purchaser, to have the contract rectified on the ground of mistake, and carried into execution. And it is even doubted, whether, consistently with the Statute of Frauds, the Court can entertain such bill, even where the mistake is admitted by the answer.²

46. So, a purchaser cannot claim premises which, though answering the general description in the advertisement of sale, were not in the contemplation of either party at the time of the purchase or conveyance; the purchaser being referred to a more particular description, which did not include them; and the surrender having been made according to that, and from his own instructions. If one party thought he had purchased *bonâ fide* part of an estate, which the other thought he had not sold, it is a ground to set aside the contract. If both understood the whole was to be conveyed, it must; otherwise, if neither understood so.³

47. It has been doubted, whether the Court would entertain a suit to reform a mistake, for the discovery of matter constituting a new case, after the subject had been adjudicated upon and disposed of by a foreign tribunal of competent jurisdiction, when it did not appear that the new matter might not still be made available before such tribunal.⁴

48. Parol evidence is not admissible, *at law*, to show a mistake in the conveyance of land sold, as compared with the agreement of sale.

¹ *Alexander v. Crosbie*, 1 Lloy. & Go. 145.

² *Attorney-General and Commissioners, &c. v. Sitwell*, 1 You. & Coll. 559.

³ *Calverley v. Williams*, 1 Ves. 211.

⁴ *Marquis of Breadalbane v. Marquis of Chandos*, 2 Myl. & Cra. 711.

49. Agreement, in writing, to sell and convey land, at £9 per acre. A deed was accordingly executed, expressing the number of acres, and the purchase-money paid at that rate. Held, no parol evidence was admissible, of a mistake in the quantity; and that an action did not lie for money had and received, to recover back the amount alleged to be overpaid.¹

¹ *Howes v. Barker*, 3 Johns. 506.

CHAPTER II.

WHAT CONSTITUTES AN AGREEMENT FOR THE SALE AND PURCHASE OF LANDS. DISTINCTION BETWEEN A CONTRACT AND A MERE PROPOSAL, OFFER, ETC.

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|---|--|
| <p>1. An offer does not bind, till accepted.</p> <p>2. Contract by <i>correspondence</i>.</p> | <div style="display: inline-block; vertical-align: middle;"> <div style="display: inline-block; vertical-align: middle;">8. Contract by several connected papers.</div> </div> |
|---|--|

1. HAVING considered the distinction between an executory sale, and an executed conveyance, of land, and the well-settled qualifications of that distinction in Courts of Equity, another somewhat analogous difference requires to be noticed, applicable as well to a sale of land as of other property; to wit, that between a *completed bargain*, assented to by both parties, and a mere *proposal*, *negotiation*, or *treaty*. Upon this point it is held, that a contract will not be specifically executed, unless upon a fair interpretation importing a concluded agreement; and not leaving it doubtful whether the transaction was more than a treaty.¹ So, an offer of a bargain imposes no obligation, unless accepted according to its terms, without qualification, or unless such qualification be agreed to.² So, where A. signs a writing, by which he declares he will sell to B. his house, &c., at a certain price, &c.; this is a mere proposition, and not a contract.³ So, where a material ingredient in the terms of a contract has been omitted, Equity, considering it as only resting in treaty, will not decree a specific execution. Thus, where a tenant in possession, under an article impeached by his landlord, proposed to pay an increased rent; a bill by the landlord for

¹ *Strafford v. Bosworth*, 2 Ves. & B. 225, 228; *Holland v. Eyre*, 2 Sim. & St. 341; *Huddleston v. Briscoe*, 11 Ves. 583. 194.

² *Eliason v. Henshaw*, 4 Wheaton, ³ *Tucker v. Woods*, 12 Johns. 190.

specific execution of the proposal was dismissed; the period, when the increased rent should commence, not being agreed on.¹ So, where A. sold land to B., and, on measurement after the sale, it was found that B. owned a part of the land sold, and A. offered, if B. would not sue him, to pay him back a part of the purchase-money, and there was no evidence of B.'s accepting the offer; held, B. could not recover on A.'s promise.² So, a proposition in writing to sell land, at a certain price, if taken within thirty days, is a continuing offer, which may be retracted at any time; but if, not being retracted, it is accepted within the time, such offer and acceptance constitute a valid contract, the specific performance of which may be enforced by a bill in equity.³

2. But an agreement for the sale of an estate, the result of a *correspondence by letters*, may be good within the Statute of Frauds.⁴ (See Statute of Frauds.) Thus, the defendant authorized one A. to propose a sale of land to the plaintiff, to be accepted within a week. Within the time, the plaintiff by letter to A. accepted the offer, but for some time A. did not inform the defendant. Held, there was a binding contract.⁵ So the defendant, by letters, stated certain terms on which the plaintiff might make a road across his land, and he (the defendant) would convey the land to him. The plaintiff, with the knowledge of the defendant, began the work. Held, he thereby became bound; that this was a valid consideration for the defendant's agreement; that the defendant could not shut up the road, after the plaintiff had performed his part of the contract; and that he should be restrained by perpetual injunction from obstructing it; but without prejudice to any claim for damages against the plaintiff.⁶

3. On the 18th of April, 1834, A., in writing, offered to sell B. certain land, upon certain terms, and allowed three months

¹ Lord Ormond v. Anderson, 2 Ball & Beat. 363.

² Burns v. Allen, 11 Ired. 25.

³ Bost. & M. Railroad v. Bartlett, 3 Cush. 224.

⁴ Huddleston v. Briscoe, 11 Ves. 583.

⁵ Wright v. Bigg, 21 Eng. Law & Eq. 591.

⁶ N. Y. &c. v. Pixley, 19 Barb. 428.

to decide upon the proposition. On the 26th of June, B. wrote to A., stating that C., the father of B., accepted the proposition, and signed the letter, "B., for his father, C." On the back of a copy of this letter, on the 19th of July, A. wrote and executed a covenant to convey the land to B., "in consideration of the within," and "when he shall have fulfilled on his part the conditions of the said agreement, a copy whereof is hereto annexed." This agreement was delivered to B., who made payments with money advanced by C., and took receipts as for money paid by C. B. took possession of and cultivated the land, C. residing with him till his death. C. died, and B. paid the balance of the purchase-money. The other heirs of C. then filed their bill against A. and B., alleging that the name of B. had been inserted by mistake in the contract of July 19, instead of that of C., and praying for a partition among the heirs of C., an account of rents and profits against B., &c. B., in his answer, under oath, denied the mistake, and averred that the money advanced for the land had been loaned to him by C., to secure the payment of which, C. was to have a lien upon the land. Held, the averment in the answer, as to the loan, was new matter, and, being unsupported by proof, was not evidence; that the letter of June 26 showed a purchase by C., and could not be explained by parol, no mistake being pretended; that the written instruments above named, as well as the parol testimony, showed that the name of B. was inserted by mistake, in the agreement of July 19, instead of that of C.; and that a decree was proper, ordering a partition among the heirs of C., and directing that B. should account for the rents and profits, be paid for the lasting improvements made by him, and refunded the purchase-money paid by him since the death of C., with interest, and that A. should convey to the heirs, according to their respective interests.¹

4. Where letters are stated as the agreement, no testimony

¹ *Lynn v. Lynn*, 5 Gilman, 602.

aliunde is admissible; otherwise, where they are stated as *evidence* of the agreement only.¹

5. A contract, by letter, may arise, and be specifically enforced, if the amount and nature of the consideration, to be paid on one side and received on the other, may be ascertained, and a reasonable description is given of the subject-matter. The Court need not be satisfied, that the parties actually meant the same thing, provided a clear assent be given to a certain proposition, arising *de facto* out of the terms of the correspondence.²

6. But the Court will not decree specific performance of an agreement for a lease by letters, where there is no definite term expressed, nor any reference, *aliunde*, by which it might be ascertained.³

7. The letters, from which a contract arises, may be written by the agents of the respective parties. Thus, an agent, ordered to buy a lease of a house for a certain sum, and sign an agreement, wrote to the agent of the owner, offering that sum. The owner wrote across this letter, "I agree to sell my house upon these terms;" and thereupon his agent wrote to the other agent, "My employer will take your offer," "make an appointment to meet to draw the agreements." The next day, the agent of the purchaser said, that his principal had bargained for another house. Held, the letters constituted a contract to buy, and specific performance was decreed, with costs.⁴

8. Although mere proposals or negotiations are always to be distinguished from a binding contract; for the purpose of determining the existence and terms of a contract of sale and purchase, various writings, connected with and referring to each other, may be taken into consideration; though neither by itself would constitute a contract.

9. The defendant, by articles, contracted to sell the plaintiff 400 acres of land, and allowance out of two tracts claimed

¹ *Birce v. Bletchley*, 6 Madd. 17. See *Huddleston v. Briscoe*, 11 Ves. 583.

² *Kennedy v. Lee*, 3 Mer. 441.

³ *Gordon v. Trevelyan*, 1 Price, 64.

⁴ *Cowley v. Watts*, 17 Eng. Law & Eq. 147.

by the defendant, on two surveys in the names of A. and B., being the 400 acres surveyed on a warrant in the name of C., for \$1,000. Subsequently, the defendant conveyed the latter tract, containing 430 acres and ten perches and allowance, and, on the same day, the plaintiff covenanted, that if this survey should include over 400 acres and allowance, he would pay \$13 per acre for the excess, and the defendant gave the plaintiff a bond for \$3 per acre for every acre included in the C. survey, which might be recovered in two pending actions. In these actions, 52 acres and 55 perches and allowance were recovered from the defendant; leaving, however, of this survey, 400 acres and 72 perches. In an action on the bond; held, the bond, covenant, and deed were to be construed together, and, as the plaintiff held under his deed over 400 acres and allowance, the action did not lie.¹

¹ *Cummings v. Antes*, 19 Penn. 287.

CHAPTER III.

CONSIDERATION OF A CONTRACT OF SALE.—PRICE.

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| <ul style="list-style-type: none"> 1. Necessity of a consideration. 3. Inadequacy of consideration. 4. Illegality of consideration. 5. Nature of consideration. 6. Need not be expressed. 11. Price; construction of the agreement for. | <ul style="list-style-type: none"> 18. Sufficiency of security for. 19. Mutual rights and duties of the parties in connection with the price. Offer to perform, tender of deed, &c. 47. To whom the price shall be paid; parties <i>jointly</i> interested. |
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1. CONTRACTS for the sale and purchase of lands must, in general, like others, be founded upon some *valuable consideration*. This will be briefly noticed at present, as one of the *elements of the contract*. We shall have occasion, hereafter, in another connection, to refer, more at length, to the want, inadequacy, or failure of consideration, as one of the circumstances which render such contract *void*. (See *Fraud, Rescinding*.)

2. Thus, upon a bill in equity for specific performance against a vendee of land; it appeared that a part only of the vendors, the plaintiffs, had become bound to convey a good title. Held, the contract should not be enforced, for want of mutuality.¹ So, an agreement, whereby the purchaser of a plantation binds himself to transfer one half thereof to his son-in-law, as soon as the latter shall pay for one half of the cost, either with his own private means, or with one half of the profits of the plantation; is void for want of mutuality, and will not be enforced by a Court of Equity; especially when the son-in-law, fifteen years after the agreement, expresses his abandonment of all his rights by a written release, and does not bring his bill in equity

¹ *Bronson v. Cahill*, 4 McL. 19.

until twenty-seven years have elapsed from the date of the agreement, without any performance or offer of performance on his part.¹ So, a promise made by one, who enters public lands, to pay a prior occupant for improvements made thereon by him, is without consideration and void.² So, there is neither a legal nor moral obligation, on the owner of land, to pay for the work and labor done upon it, by one who has entered without his consent, or any color of right, and held possession against him. Hence, a promise thus to pay is without consideration and void.³ So, a contract for the sale of land will not be enforced, where it has been lost, without proof of the identity of the land claimed and that referred to, and of the amount and payment of the consideration.⁴

3. Although entire *want* of consideration avoids the contract in question, it may be stated, as the general rule, that *inadequacy* of consideration is no ground for resisting the execution of a contract to sell, the vendor not being under any incapacity or deficiency of judgment, or led by accident or design into a misapprehension of the value.⁵ But execution is sometimes decreed without costs.⁶ In case of apparent *fraud*, or if the situation of the parties is so unequal, as to give one of them an opportunity of making his own terms; equity will not lend its aid to execute the contract, but leave the party to his remedy at law.⁷ So, where the inadequacy of price, in a contract to sell or convey, is so great as to be conclusive evidence of fraud, as where it would shock the moral sense of an indifferent man, Chancery should not carry it into effect.⁸

4. *Illegality* of consideration avoids the contract. Thus, where property has been conveyed, for the purpose of protecting it from the creditors of the grantor, no obligation to

¹ Dorsey v. Packwood, 12 How. U. S. 126.

² McFarland v. Mathis, 5 Eng. 560.

³ Frear v. Hardenbergh, 5 Johns. 272.

⁴ Madeira v. Hopkins, 12 B. Mon. 595.

⁵ Western v. Russell, 3 Ves. & B. 187; Burrowes v. Locke, 10 Ves. 470;

Wormack v. Rogers, 9 Geo. 60; M'Artee v. Engart, 13 Ill. 242; Mann v. Beterly, 21 Verm. 326.

⁶ Burrowes v. Locke, 10 Ves. 470.

⁷ Potter v. Everitt, 7 Fred. Eq. 152; Powers v. Hale, 5 Post. 145.

⁸ Seymour v. Delancey, 3 Cow. 445.

reconvey, growing out of the transaction, or forming a part of it, can either be itself enforced, or form the consideration of an enforceable promise or covenant, written or parol.¹

5. The consideration need not be a *cash* payment. Thus, a note for the purchase-money is sufficient consideration for a bond to convey.² So, if a vendee of land covenant to erect a brick building thereon within a certain time, this is a valid consideration for the covenant to sell.³ So, if the only condition of a bond for title is, that titles shall be made as soon as a patent from the government is procured; the presumption from its face is, that the purchase-money has been paid; and it is no notice to an assignee to the contrary.⁴

6. It is not necessary to constitute a valid consideration for a contract to sell land, that the purchaser should *expressly* stipulate to buy or pay for it.

7. Agreement, that one party will sell lands to another, and convey them on a certain day. The purchase-money was paid down, the vendor agreeing, at the end of a year, upon thirty days' notice, to refund it with interest. The agreement being signed by both parties, held, there was sufficient consideration, though the purchaser did not expressly contract to do any thing; that the purchase and payment were a sufficient consideration for the seller's engagement to convey or repay the money; that the agreement was substantially an alternative one, either to sell and purchase land, or to borrow and lend money, at the election of the purchaser at the end of the year, and, upon giving notice, he might recover back the money; and that, if he should receive a conveyance before calling for the money, he could not afterwards recover the money, without reconveying the land.⁵

8. The plaintiff, by a contract *inter partes*, and signed by both, agreed to sell to the defendant his farm in Florence, Oneida County, for \$1,700 in cash, and 240 acres of land

¹ Ford v. Lewis, 10 B. Mon. 127.

⁴ Burns v. Taylor, 23 Ala. 255.

² Whiteside v. Jennings, 19 Ala. 784.

⁵ Eno v. Woodworth, 4 Comst. 249.

³ Brewer v. Bessinger, 25 Miss. 86.

owned by the defendant, in Lake County, Illinois, upon certain terms and with certain reservations. A penalty of \$500 was provided for breach of the contract. On the day appointed, the plaintiff tendered a deed, and demanded the money and a conveyance of the land, but the defendant did not thus pay or convey, although the plaintiff was ready to perform on his part. Held, in an action for the price, and also for specific performance, that although the defendant did not expressly agree to buy or pay for the farm, such agreement was to be implied; that the measure of damages was the price to be paid; that the \$500 was not designed as stipulated damages, but as a penalty to enforce performance, and therefore was no bar to this suit; and that the contract was sufficiently definite to be specifically enforced.¹

9. A bond was made, in Alabama, by one member of a firm to another, expressing no consideration, and conditioned to give a quitclaim deed of certain land in two years. The same day, the parties entered into an agreement, by which the obligee covenanted to use his best endeavors for two years to collect the partnership debts, and pay their liabilities. Held, a consideration for the bond was implied, and, as neither instrument referred to the other, and the two related to different subjects, they could not be treated as parts of one transaction, nor the covenant of the obligee treated as the consideration of the bond.²

10. A declaration alleged a written agreement, that the plaintiff would let, and one A. would take, a house, at an annual rent, and that the defendant thereby agreed to see the rent paid by A. or pay it for him; that the plaintiff let the house, and A. became tenant, on the terms of the agreement; and that neither A. nor the defendant paid the rent. Held, on demurrer, the consideration for defendant's promise was the letting of the house, and this sufficiently appeared in the agreement.³

¹ Richards v. Edick, 17 Barb. 260.

² Holman v. Crane, 16 Ala. 570.

³ Caballero v. Slater, 25 Eng. Law & Eq. 285.

11. In this connection, may be considered the subject of a purchaser's liability to pay the agreed *price*, and the defences sometimes made against actions therefor. (a)

12. The terms of the contract may be such as to render this liability alternative or contingent; or, as in the following case, to give a right of election to the vendor alone, not to the vendee. (b) Thus, a purchaser of land paid part of the

(a) The question sometimes arises, whether the sum stipulated to be paid by a purchaser is to be viewed as a *penalty* for violation of the contract, or as part of the price, or as *liquidated damages*. Thus, where a purchaser covenanted, in consideration of having the property conveyed to him for a certain sum, that he would, by a certain day, erect two brick houses of specified dimensions, or, in default thereof, pay to the grantor, on demand, the sum of \$4,000; held, the sum specified was not a penalty, but part of the price; and, on failure to erect the houses, the covenantee was entitled to recover it as liquidated damages, not merely the actual damages sustained. *Pearson v. Williams*, 26 Wendell, 630.

So, where A., in consideration of \$500, paid in full, for fifty acres of land, covenanted to convey the land to B. by a good and sufficient deed, on or before a certain day, or, in lieu thereof, to pay him \$800; held, B. was entitled to recover that sum on a breach of the covenant, with interest; the same being in the nature of liquidated damages, and not a penalty. *Slosson v. Beadle*, 7 Johns. 72.

But a purchaser of land, who has contracted to pay a specific sum as the price, cannot be relieved from the payment by the tender of a less sum, also agreed upon in the contract as stipulated damages, to be paid in case of non-performance on his part. *Ayres v. Pease*, 12 Wendell, 393.

(b) The price to be paid is sometimes left to *arbitration*. But specific performance cannot be decreed, of an agreement to sell at a price to be fixed by arbitrators (already appointed to settle other matters in dispute between the parties); where the defendant (the vendor) had refused to execute the arbitration bond, and it was therefore uncertain that any award would ever be made. *Wilks v. Davis*, 3 Mer. 507.

Nor of an agreement to sell, at a price to be settled by arbitrators named by the parties, if no award has been made. But, if the parties are agreed as to a valuation, but have not appointed any persons to make it, the Court will itself interfere, so as to ascertain the value, and direct specific performance. *Daly v. Duggan*, 1 Ir. Eq. Rep. 311.

The Court will not entertain a bill, for specific performance of an

price, and gave notes for the balance, payable respectively in one, two, three, and four years, the vendor agreeing, upon payment of the notes as they should fall due, to convey the land. But, if the purchaser should refuse or neglect, upon request, to pay either of the notes at maturity, the obligation to convey should become void, and all previous payments be retained as liquidated damages for breach of the contract. Held, the stipulation last-named did not excuse the purchaser from payment of the notes, if claimed by the vendor.¹

13. So the contract may be such, as to give the *vendee* a similar election. Thus, on the purchase of certain real estate, part of the purchase-money was paid, and promissory notes, payable at specified times with interest, were given for the residue. The vendor gave the vendee a title bond, the condition of which stated, that it was agreed between the parties, that if said notes and interest were not paid at maturity,

¹ Cartwright v. Gardner, 5 Cush. 273.

agreement to refer to arbitration, nor substitute the master for the arbitrators. *Agar v. Macklew*, 2 Sim. & Stu. 418.

But where there is a contract to sell at a valuation by persons named, the Court will compel the vendor to permit the valuation. *Morse v. Merest*, 6 Madd. 26.

The time of valuation is of the essence of the contract; but the defendant (vendor) cannot take advantage of it, if he improperly occasion the delay. *Morse v. Merest*, 6 Madd. 26.

Where, in an agreement for the sale of land, it is stipulated that the price shall be fixed by an arbitrator, and the agreement be made a rule of Court; the award being published, and the agreement made a rule of court, the vendor cannot have an attachment for the price. His only remedy is by action on the articles. *In re Lee and Hemingway*, 3 Nev. & Man. 860.

Contract for sale, at a price to be fixed by arbitrators within a certain time, or, if they should not agree to make their award within the time, by an umpire, also within a limited time. Held, as the contract required delivery of the award in writing to each party; though the consequential acts, execution of conveyances, &c., might be done by representatives; the contract, in reference to the terms to be fixed by the award, was personal to the parties; and, one of them having died before the award, specific performance was refused. *Blundell v. Brettargh*, 17 Ves. 232.

the bond should be void, and the money paid, forfeited to the vendor; or if, on payment, as aforesaid, the vendor or his assigns should make a warranty deed in fee simple to the vendee or his assigns, then the bond to be void. Held, the vendee was not bound to pay the notes, but might abandon the contract, and forfeit the money paid.¹

14. It has been held, that parol evidence is admissible, that an additional sum was to be paid for land conveyed, upon a certain contingency, which has occurred.²

15. A contract to purchase a certain tract of land described by boundaries, supposed to contain 242 acres, at so much per acre, is not a contract to pay for 242 acres at that rate; but for so many acres as there may be in the tract.³

16. Where, by the terms of a contract, dated December 24, for the sale and purchase of land, the payments were to be made as follows: “\$100 on the date hereof, \$100 by the 1st of May next, and the residue to be paid in annual payments of \$100 each, with interest on the whole sums unpaid from the date hereof;” held, the “residue” was payable in annual payments computed from the 1st of May, and not from the date of the contract.⁴

17. The plaintiff sold land to A. by written agreement, and A. assigned his interest to the defendant, who took possession. The plaintiff and defendant subsequently executed an agreement, settling all disputes about quantity and boundaries, the plaintiff to pay \$20, and the agreement not to affect claims between the plaintiff and defendant, or A. and the defendant. In this action for the balance of the price the defendant sets up the latter agreement. The plaintiff then offered parol evidence, which was admitted, that the agreement was not intended to release the purchase-money. Held, such was not its legal effect, and therefore the admission of the parol evidence was no ground for reversing the judgment.⁵

¹ Peterson v. Dickey, 8 Blackf. 427.

² Nickerson v. Saunders, 36 Maine, 413.

³ Ayres v. Hayes, 13 Mis. 252.

⁴ Judd v. Ensign, 6 Barb. 258.

⁵ McMahan v. Davis, 19 Penn. 354.

18. Where the price of land is to be paid otherwise than in money, questions may arise as to the respective rights and duties of the parties, in regard to the sufficiency of the proposed security. Thus, it is held, that a vendor is not bound to receive indorsed notes, unless they are not only good, but there is no reasonable cause to reject them. Declaration, that by the contract the purchaser was to execute his notes for the purchase-money, with approved securities. Plea, "that the securities offered by the defendant were good and sufficient to secure the purchase-money of said lands." Held bad, on demurrer, as it did not also aver, "that there was no reasonable cause for rejecting them."¹

19. In this connection may be considered the important questions, as to the liability of the respective parties, with reference to the price, so far as that of each depends upon a performance by the other.

20. In general, the plaintiff, who seeks for the specific performance of an agreement, must show that he has performed, or offered to perform, on his part, the acts which formed the consideration of the alleged undertaking on the part of the defendant.² Thus, a vendor is not bound to convey, or part with his title, until the purchase-money is paid.³ So, if by agreement, the making of the title and payment of the purchase-money are to be concurrent acts, neither party can sustain a suit on the agreement, without having first performed or offered to perform his part of it.⁴ So, where a vendor has no title, the contract is a nullity, and the vendee may recover back the purchase-money paid.⁵ So, upon a bond to convey, on payment of the purchase-money, no action lies at law or in equity, without payment or tender thereof.⁶

21. But, upon tendering a deed, and offering to perform

¹ *Adams v. McMillan*, 7 Port. 73.

² *Colson v. Thompson*, 2 Wheaton, 336, 341.

³ *Ishmael v. Parker*, 13 Ill. 324 ;
Manley v. Cremonini, 11 Eng. Law &

Eq. 573; *Tucker v. Woods*, 12 Johns. 190.

⁴ *Shirley v. Shirley*, 7 Blackf. 452.

⁵ *Pipkin v. James*, 1 Humph. 325.

⁶ *Browning v. Clymer*, 1 Cart. 579.

his agreement, the vendor may recover the purchase-money at law.¹

22. Sale of a tract of land, containing 181 acres, at \$45 per acre, with an agreement to deduct the price of such part of which peaceable possession could not be given. Subsequently, a deed was given, without covenants, describing the land by metes and bounds, and as containing 181 acres, more or less, and possession taken. Held, the vendee was bound for the whole price, though he should give up part of the land.²

23. Unsealed agreement, by which A., in consideration of \$75 paid by B., and \$15 to be paid by C., engaged to convey certain land on a certain day to B. C. not having paid the \$15, held, A. was not bound to convey.³

24. Land was sold at auction to the defendant, who subscribed the terms of sale; which were, that a certain part of the purchase-money should be paid within seventy-five hours; that a deed should be given by the vendor, *with warranty of title except as to the quit rents in such lots as should be designated*; that the purchaser should execute a bond and mortgage for the residue of the purchase-money; and that the deed, bond, and mortgage, should *bear date on the day of the sale*. At the time of sale the premises were mortgaged, and the mortgage had been previously registered, and was still unsatisfied. In an action of *assumpsit* by the vendor, against the purchaser, it was held, that giving the deed, bond and mortgage were to be simultaneous acts; that, as the plaintiff was not in a situation to convey a title, the defendant was not bound to perform the agreement on his part; that the meaning of the agreement was not merely that the plaintiff should give a deed with warranty, but that he was able to convey an indefeasible title; and that although the mortgage was registered, and the defendant therefore had notice of it, yet that circumstance was immaterial; for, by

¹ Richards v. Edick, 17 Barb. 260.

² Smith v. Chaney, 4 Md. Ch. 246.

³ Gilman v. Schwartz, 36 Maine, 541.

the terms of sale, the quit-rents were the only incumbrance on the land. Held, also, that if the vendee has, according to the terms of the sale, paid part of the consideration-money, and the vendor is unable to convey a good title, the vendee may disaffirm the contract, and recover back the money.¹

25. In August, 1846, a father executed a bond to his son, to convey to him certain real and personal property, provided the son, living in another State, should return with his family in the spring or summer of 1847, purposely to provide for and maintain for life the father, his wife and daughter, and give bond therefor, and to pay the father's debts. The son did not return in 1847, and, in the fall of that year, the father, standing in need, conveyed all his property to the plaintiffs, they giving bond to provide for him and his family, while they should live alone. The plaintiffs had notice of the bond to the son, and it was understood that the property was to be surrendered to him on his return. In the fall of 1849, the son returned with his family, and, early in 1850, the father notified the plaintiffs, offered to surrender their bond, and demanded a transfer to the son. Two days after, the son executed the bond agreed upon, and the father conveyed the land to him. He entered, and the plaintiffs bring ejectment. Held, the plaintiffs had acquired the legal title, and, in order to obtain it, the son must show a compliance with his bond; that, if the plaintiffs had performed its conditions, in whole or in part, for him, on the faith of their title, they were not bound to convey, till he compensated them; not including, however, any advances on accounts, except those made on the strength of the title.²

26. In a contract for the sale of lands, it was agreed that the vendor should redeem a part which had been sold for taxes; that, if the vendee should redeem, the sum paid by him should be allowed on the contract; and that, if the land could not be redeemed, a deduction should be made from the contract. Held, this covenant was for the benefit of the

¹ Judson v. Wass, 11 Johns. 525.

² Adams v. Smith, 19 Penn. 182.

vendee, for the purpose of removing an incumbrance, and looked solely to the title which he was to receive; that the vendor was bound to redeem, and, the title having been lost by his neglect, the purchaser was not bound to pay for that part of the land, nor to take a deed including it. Also, that the vendee, having voluntarily paid the purchase-money for the whole of the land, and demanded and received a deed for the whole, could not maintain an action upon the contract, to recover the value of the part sold for taxes, his only remedy being upon the covenants in his deed.¹

27. Although, in general, the purchaser shall not recover possession, till he has paid or tendered the purchase-money; it has been questioned, whether this must be done previous to the commencement of an action. And it is not requisite, if the vendor be the executor of the vendee, and retain effects equivalent to the purchase-money.² So, the above rule may be qualified by the special terms of the agreement. Thus a bond for title was given, reciting, that in consideration of a certain sum, secured by note, payable in twelve months, the obligor had sold certain land; and conditioned to give a good warranty title-deed "when the purchase-money should be paid, or when a patent for the land should be obtained from the government." In an action upon the note, held, a conveyance was not a condition precedent to payment of the price.³ So, although where the complainant, who seeks specific performance of an agreement for the sale of land, has not performed his part of the contract, the Court will not decree specific performance, especially if any injury has thereby resulted to the defendant; yet, the defendant having taken possession, paid part of the purchase-money, and executed the agreement in part, the Court will consider him as having waived his objections, and will decree execution. It will, however, extend the time of payment, vary the security to be given, and regulate the payment of in-

¹ Bull v. Willard, 9 Barb. 641.

² Smith v. Patton, 1 Serg. & R. 80.

³ Perry v. Rice, 10 Tex. 367.

terest, according to the justice of the case, under the circumstances.¹

28. The defendant covenanted to convey to the plaintiff, on condition that the plaintiff paid him \$500 by instalments. The plaintiff entered, and paid the first, and offered to pay the second if the defendant would give him security against a mortgage on the premises, existing at the time of the purchase. The defendant refused the security, but offered to receive the money, and perform the contract. The plaintiff refused to pay any more money, and the defendant brought an ejectment, and ejected him. The plaintiff then brought this action to recover back the money. Held, the plaintiff had no right to rescind and recover back the money, there being no fraud on the part of defendant, and the plaintiff not having entitled himself to demand a deed.²

29. An agreement between A. and B., that B. shall pay A. a sum of money *for his land on a particular day*, amounts to a covenant by A. to convey; the term *agreed* being the word of both parties; but it is an independent covenant, and A. may bring an action for the money before any conveyance.³ So, where the agreement is, to convey in fee simple, a judgment against the vendor will not, at law, authorize the vendee to rescind; inasmuch as a conveyance without covenants would satisfy such an agreement.⁴

30. Marriage articles recited that A., the father of the intended husband, had agreed, in case the marriage should take effect, to pay £200, and also to settle the lands of T., as thereafter mentioned; and that B., the father of the intended wife, who was an infant, had agreed to convey the lands of G., as thereafter mentioned, and also to pay to the husband £100 upon the marriage. It was then covenanted by A., that, in case the marriage should take effect, and B. should, as soon as the intended wife came of age, settle the lands of G. to the uses thereafter expressed, he, A., would settle the

¹ Ramsay v. Brailsford, 2 Desaus. 583.

² Ellis v. Hoskins, 14 Johns. 363.

³ Pordage v. Cole, 1 Saunders, 320.

⁴ Fuller v. Hubbard, 6 Conn. 13.

lands of T. to his own use until the marriage, and from and after the marriage to his own use for life, with remainder upon certain trusts for the benefit of the husband and wife, and the issue of the marriage; and it was covenanted by B. that in case the marriage should take effect, and A. should perform his covenant, he, B., would settle the lands of G. to the use of himself for life, with remainder upon certain trusts for the benefit of the husband and wife, and issue of the marriage. The marriage took effect, and the wife came of age, but B. failed to settle the lands of G. Held, nevertheless, that A. was bound to perform the covenant on his part.¹

31. A. sold to B. his equitable estate in one fourth of certain premises, subject to a mortgage of \$1,500, and authorized and requested the trustee to convey the same to B. B. agreed to assume the payment of one fourth of the mortgage, to save A. harmless therefrom, and to pay him the sum of \$625. It turned out that there was a mortgage of \$1,600. Held, the agreement was an executed one, and nothing further was necessary to be done by the vendor, to enable him to sue for the sum so agreed to be paid; that, no time being limited, said sum was payable immediately, with interest from the date of the instrument; and that the variance in the amount of the mortgage did not avoid the contract.²

32. Bond for a quitclaim deed of land on a certain day, on payment of a certain price. At the day, the obligee offered to pay the money, having it within his reach and control, though not actually in hand, but made no tender. The obligor insisted that the money should be paid before giving the deed, and refused to convey simultaneously with the payment. Held, the obligee was entitled in equity to a decree for a quitclaim deed free from incumbrances, created by the obligor since the date of the bond.³

¹ Lloyd v. Lloyd, 2 Myl. & Cra. 192.

³ Parker v. Perkins, 8 Cush. 318.

² Rogers v. Colt, 1 New Jersey, 18.

33. Upon the question, what constitutes a *performance* by one party, enabling him to enforce an execution by the other; the general principle is, that it must be a *substantial* compliance with the contract, as reasonably construed with reference to the rights and interests of both parties. Thus, where one of the considerations of an agreement to convey land was, that the purchaser should reside thereon, and he did reside thereon two years, and then left; held, this was a sufficient performance on his part.¹ So, an agreement for the conveyance of land provided, that the purchaser, in addition to the purchase-money, should first clear the land of stones, "at the rate of at least three acres by the year, until the whole lot is cleared," "and haul the stones into heaps, or near the road in places easy of access," to be taken away by the grantor. Held, the purchaser was not bound to clear the three acres in one parcel, but might clear to that amount in several parcels.² So, the defendant promised to pay the plaintiff £5, if he would provide a tenant for certain premises, and get him £350 for his lease. The plaintiff procured a tenant, with whom the defendant entered into an agreement, and received £50 as a deposit. The tenant being unable to complete his engagement, the defendant afterwards released him, but retained the £50. Held, this was a substantial performance of the condition on the part of the plaintiff, and he was entitled to recover the £5 from the defendant.³

34. Conveyance of land, the grantee paying the consideration therefor, and also agreeing in writing, "for value received, to pay the grantor or order \$100, when the grantor's wife shall sign the deed; if she does not sign it, the note to be null and void." The wife, having a right of dower, died without signing. Held, the grantor could not recover the \$100, either as part of the price, or upon the written agreement.⁴

¹ Shaw v. Livermore, 2 Greene, 338.

² Farwell v. Rogers, 4 Cush. 460.

³ Horford v. Wilson, 1 Taunton, 12.

⁴ Pendergast v. Meserve, 2 Fost. 109.

35. Written agreement, that the defendant would sell a lot of land at a certain price, and advance to the purchaser a certain sum towards building a house of a certain value, which the latter agreed to build. The purchaser drew an order on the defendant in favor of the plaintiff, payable when the drawer should have fulfilled his contract, and requesting the defendant to charge the amount thereof as part of the sums to be advanced. The defendant accepted the order, provided the drawer should perform his part of the agreement, not otherwise. The drawer built a house, of less value than was agreed. In an action on the acceptance, the plaintiff offered evidence of a waiver by the defendant of the condition of the contract and acceptance. To show the value of the house, the defendant produced receipts from the drawer, and other orders paid by the defendant, amounting to more than the agreed advances. Held, the jury were rightly instructed, that the action might be maintained, if the defendant had waived the condition of the contract, as to the value of the house; not otherwise.¹

36. On a sale of land, the purchaser paid part of the price, and gave notes for the balance, taking a bond for title "on the punctual payment of the notes;" took possession, but failed to pay the notes, and the vendor resold the land. Held, a mutual and dependent contract, requiring performance or readiness to perform by each party before he could exact performance by the other; and that the vendor could not treat the contract as at an end, without refunding the money paid.²

37. Sale of land, for a sum of money paid down, and an agreement to pay a further sum, whenever the Court should establish the validity of patent titles over tax titles. This Court afterwards decided the revenue laws, under which the land had been sold for taxes, to be constitutional and valid. Held, the purchaser was not further liable.³

¹ *Grandy v. Kittredge*, 8 Cush. 562.

² *Johnson v. Jackson*, 27 Miss. 498.

³ *Markham v. Stevenson*, 15 Ill. 209.

38. Where, by the contract, possession was to be delivered before payment, and was so delivered, it is not necessary to tender the balance of the money before commencing an ejectment.¹

39. In general, if a party to the contract *disables* himself to perform it, the other party acquires the same rights, as in case of a voluntary neglect or refusal on the part of the former. (a) Thus, the right of action, for breach of a parol contract of purchase, accrues when the vendor conveys to a stranger.² So, where a contract was made, dated April 20, and executed before noon of that day, to convey land within twenty days from date; and, on May 9, the land was conveyed to another person; held, a breach of the contract.³ But where A., who claimed real estate under articles of agreement, after a written contract of sale by him, conveyed one moiety of his interest in certain larger premises, including the ground previously sold, to one having notice of the previous sale, and with an understanding that it was to be carried out; held, such conveyance did not amount to an abandonment of the contract on the part of A., and furnished no ground to the first purchaser, to refuse to complete the bargain.⁴

¹ Bassler v. Niesly, 2 Serg. & Rawle, 355.

³ Buttrick v. Holden, 8 Cush. 233.

² Thurston v. Franklin College, 16 Penn. 154.

⁴ Tienan v. Roland, 15 Penn. 429.

(a) On the other hand, the party *against* whom a remedy is sought may have disabled himself to perform. But although, in general, a bill in equity will not lie, after a party has put it out of his power to fulfil a contract to convey land, when the fact of his having disqualified himself is known to the complainant previous to the filing of the bill; yet, where no action could be sustained at law, but a bill in equity might have been, the rule does not apply. Hence, where a parol contract was sought to be enforced on the ground of part-performance, and no action could have been brought for damages, this was held no objection to the bill, although filed after the party contracting had conveyed away the property. In such a case, the assessment of damages in equity is the only remedy. *Jervis v. Smith*, 1 Hoffm. Ch. 470.

40. With regard to the particular acts which the vendor or vendee is to perform, in order to establish a legal claim against the other party to the contract; there is some conflict in the authorities upon the point, under what circumstances, and by whom a deed of the land sold is to be tendered. The prevailing rule, however, seems to be, that where, in a sale of land, the acts of the parties are to be concurrent, in order to maintain an action for the price or for damages for a breach, the seller must prove tender of a deed, or that the defendant had waived such tender, or by his conduct made it nugatory.¹ More especially, a vendor is bound, on payment of the price, to prepare and tender a deed.² So, where land was sold, to be paid for in instalments, and a bond given, conditioned for payment of the several instalments and conveyance of the land; held, the payment of the last instalment and the making of the deed were concurrent acts, and an action for such instalment could not be maintained, without showing a tender of the deed.³ So, a bond to convey is broken by the obligor's refusal to convey, though the obligee does not present a deed for him to execute.⁴ So, to enable the plaintiff to recover the purchase money paid on a contract for land, after the defendant fails to make conveyance according to agreement, it is not necessary for him to tender a deed for the defendant to execute, unless expressly required to do so by the contract.⁵ So, where there is a mutual obligation, on a purchaser to pay or secure the purchase-money, and on the vendor to convey the property, an offer and readiness to perform, on the part of the purchaser, is enough, especially where the vendor refuses to convey at all.⁶ So, where a vendor has no title, and cannot procure or cause one to be made, the vendee may, without preparing and tendering a deed, obtain in equity a rescission of the contract.⁷ So, if a complaint, upon

¹ Dubignon v. Loud, 5 Rich. 251.

² Walling v. Kinnard, 10 Tex. 508.

See Duke v. Shore, 1 H. Bl. 270.

³ Hook v. Nebeker, 1 Smith, 92.

⁴ Garnett v. Yoe, 17 Ala. 74.

⁵ Carson v. Lucore, 1 Iowa, 33;

Powers v. Bridges, Ib. 235.

⁶ Bellinger v. Kitts, 6 Barb. 273.—

⁷ Read v. Walker, 18 Ala. 323.



a contract for sale and exchange of land, alleges a request to convey and a refusal, which are not denied by the answer; a demand for a deed need not be proved.¹

41. Where several lots are sold, the vendor is bound, if required, to give separate deeds, and his offer to execute one deed for the whole does not render the contract entire.²

42. A vendor, having tendered a deed, conformably to his contract, executed and acknowledged according to the law in force at the time of the tender, may file a bill in chancery for the purchase-money; but if, before a decree, (the deed not having been delivered,) the form of acknowledgment be changed by law, the decree for the complainant should be, that he deliver the deed duly executed and acknowledged, and that the defendant at the same time pay the purchase-money.³

43. Although it is the duty of a vendor to prepare and offer a deed, if he knows the vendee; where he does not, and the representative of the vendee refuses information when asked, the vendor may recover the purchase-money without an offer of the deed.⁴

44. So, in an action for the purchase-money of real estate, for which the purchaser had given his negotiable promissory note, the plaintiff is not bound to show a conveyance, the presumption being, that the defendant, having thus given his note, was satisfied with the execution of the contract on the part of the plaintiff.⁵

45. On the other hand, it has been held, that, in the absence of any express agreement, the *purchaser* pays the cost of a conveyance.⁶ So it has been held, that something more than simple notice is necessary, on the part of a purchaser, of his design to rescind the agreement. He must, on the day fixed for completion of the contract, or, where no day is fixed, within a reasonable time, demand a conveyance, with

¹ Fagan v. Davison, 2 Duer, 153.

² Van Eps v. Schenectady, 12 Johns. 436.

³ Conwell v. Clappool, 8 Blackf. 124.

⁴ Christian v. Nixon, 11 Ired. 1.

⁵ Lyman v. United States Bank, 12 How. 225.

⁶ Winter v. Jones, 10 Geo. 190.

notice that, if the contract is not completed, he will not be bound by it; and, by the custom of the State of Pennsylvania, he should tender for execution the necessary papers, especially where the time of payment is optional with him.¹ So also, it is held in New York, that it is not necessary for a vendor, under a covenant to convey, to make out and tender a deed on the day the purchase is to be completed. He is not bound to prepare it, until the buyer is ready to demand it; and even then, the vendor is allowed a reasonable time to draw and execute the deed; and, after being thus drawn and executed, he is to hold it ready for delivery when required; and he is not in default until the latter request is made. Although a purchaser may prepare the deed and tender it for execution, (and then only one demand is necessary,) yet still the above appears to be the settled law of the State.² So, where one agrees to convey land, on the payment of money, the vendee must not only tender or pay the money, but demand a conveyance; and, after waiting a reasonable time to have it made out, must present himself to receive it.³ But a purchaser is not bound to prepare and tender a deed, if the vendor is unable to give a title as agreed.⁴ Nor to tender the purchase-money and demand a title.⁵ And any obligation on the part of one party, to tender a sufficient instrument for execution by the other, may be *waived* by a general refusal of the latter to complete the contract. Thus, the vendors of real estate, under articles of agreement with one who claimed under one of the vendors, in due time executed a deed to the vendee and her heirs, and endeavored to have it tendered to her, but the tender was prevented by her sickness and death. The deed was afterwards offered to her executors, accompanied, however, with a mortgage and bonds for execution. The deed was insufficiently acknowledged by the wives of the grantors, and the

¹ Tiernan v. Roland, 15 Penn. 429.

² Wells v. Smith, 2 Edw. 78.

³ Fuller v. Hubbard, 6 Cow. 13.

⁴ Johnson v. Collins, 17 Ala. 318.

⁵ Griggs v. Woodruff, 14 Ala. 9.

bonds were not conformable to the contract, as to the time of payment, but the executors or devisees did not object to receiving them on this ground, but refused generally to perform the contract. There was no evidence of a refusal by the vendors to amend the acknowledgment, or to accept of other securities, in accordance with the contract. Held, such tender was evidence of the willingness and desire of the vendors to comply with their agreement.¹

46. With regard to the party, to whom payment for land purchased is to be made; it has been doubted, whether a power to sell, unrestricted, authorizes the agent to receive payment.²

47. Questions sometimes arise from the joint or distinct interests of different parties in the purchase-money of land, or in the land itself, as connected with the price paid, or to be paid, for it.

48. Where several parties agree to pay a certain sum upon another party's tendering a deed; it is sufficient to offer the deed to one of them.³

49. Two persons united to purchase a tract of land, for which they gave \$3,000; and entered into a contract under seal, by which one was to pay \$2,000, and the other \$1,000, of the purchase-money, and the land to be equally divided between them. Held, each was to have a moiety of the land.⁴

50. A. and six others entered into articles of agreement with B., respecting the purchase of western lands, on the joint account of all. The seven were to provide funds, to meet the drafts which B. should make on A., and the money was to be expended by B. in making the purchases. Conveyances were to be taken to A., in trust for all the associates. B. was to draw the drafts at not less than ten days' sight, and to make to A. monthly statements of his purchases. B.

¹ *Tiernan v. Roland*, 15 Penn. 429.

² *Hackney v. Jones*, 3 *Humphreys*, 612; 9 *Leigh*, 387; *Mynn v. Joliffe*,

1 *Moo. & R.* 326; *State of Illinois v. Delafield*, 8 *Paige*, 527.

³ *Oatman v. Walker*, 33 *Maine*, 67.

⁴ *Stubblefield v. Beazely*, 5 *Gratt.* 51.

accordingly purchased lands of C. in Michigan, took a conveyance to A. and placed it on record. For a portion of the purchase-money, not paid down, he gave the notes of A. at one and two years, signing them as the agent of A.; and, when one of the notes became due, he substituted for them drafts on A. Soon after the purchase, B. communicated it personally to six of the associates, and stated to them the price and time of payment, and they approved thereof. He also transmitted the conveyance to A.; and it did not appear that A. or any of the associates had done any act repudiating the purchase; but the drafts were neither accepted nor paid. Held, the associates were liable to C. for the price of the lands agreed upon, in an action for lands sold and conveyed to A. at their request; and that, after the lapse of a considerable time, they should be deemed to have waived any objection to the purchase, on the ground of B.'s having exceeded his authority.¹ [BRONSON, J., and CADY, J., dissenting.]

51. A. contracted to purchase lands of B., and then to sell a part of them to C. Afterwards, A. assigned his original contract to D., by way of mortgage, D. having notice of the contract between A. and C. For the purpose of extinguishing the interest of A., B. exacted a forfeiture of the original contract, on account of the non-payment of the purchase-money, subject, however, to the rights of C. and D., and D. subsequently took a conveyance from B. of the whole of the land. Held, the portion of the land not contracted by A. to C. was the primary fund for the payment of the original purchase-money, and, such portion being sufficient for that purpose, that D. was bound to convey to C. his portion of the land, on being paid by C. such a sum only as remained unpaid, on the contract between A. and C.²

52. Land of A. was sold on an execution in favor of B., and C. paid to B. a part of the amount of the judgment, under an understanding that, upon the payment of an additional sum, B. should convey the land to C. in trust for the

¹ *Sage v. Sherman*, 2 Comst. 417.

² *Crafts v. Aspinwall*, 2 Comst. 289.

wife and children of A. C. died, without having paid said additional sum, and B. paid over to C.'s administrator the amount which C. had paid. Held, the administrator, by receiving said sum, had rescinded the contract for a conveyance made between B. and C.¹

¹ *Smith v. Smith*, 1 *Greene*, 307.

CHAPTER IV.

INTEREST.

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|---|--|
| 1. Claim of a vendor for interest. | 17. <i>Investment</i> of the purchase-money. |
| 13. <i>Rate</i> of interest. | 20. Claim of a vendee for interest. |
| 15. Interest in case of <i>reversions</i> . | 29. Interest on money paid into Court. |

1. HAVING, in the last chapter, considered the subject of *consideration* or *price*, I proceed, in the natural order of topics, to treat of the liability of the respective parties to a contract of sale to pay *interest*; the one upon the purchase-money unpaid, the other upon the purchase-money paid, but for any cause subject to be recovered back by the purchaser.

2. Upon this subject, the general rule is, that a purchaser in possession must pay interest.¹ So, if the contract specifies no time for a conveyance, but the price is made payable upon receiving a deed; the law implies immediate execution. Hence, the vendor becomes immediately liable for the rents and profits, and the vendee for interest.² So, where a leasehold farm was sold, and three years had expired pending a suit by the vendor who was in possession; interest was allowed, and he was charged with a rent.³ So, interest begins when the money is due—the right to rents and profits when the vendee is entitled to possession.⁴ So, where parties already in possession agreed to purchase, and pay the purchase-money on a particular day, “on a good and valid title being made and executed,” and a title was not made for

¹ *Stevenson v. Maxwell*, 2 Comst. 408; *Hood v. Huff*, 2 Const. 163; *Kester v. Rockel*, 2 W. & S. 365; *Ramsay v. Brailsford*, 2 Desaus. 592.

² *Hundley v. Lyons*, 5 Munf. 342.

³ *Dyer v. Hargrave*, 10 Ves. 505.

⁴ *Baxter v. Brand*, 2 Dana, 298. See *Buchanan v. Lorman*, 3 Gill, 82; *Brockenbrough v. Blythe*, 3 Leigh, 647; *Williams v. Rogers*, 2 Dana, 375.

many years, but they remained in possession, and did not appropriate the purchase-money; held, they were liable for interest from the day mentioned.¹

3. But where payment is to be made upon conveyance of the land at a certain time, and it is not thus conveyed, the purchaser is not in default by neglecting to pay the price, and is not liable for interest till after tender of a deed. So, though he has taken possession, if the land is vacant and unproductive.² So, a purchaser not in possession is bound to pay interest, and take the rents and profits, only from the time when a good title is first shown, not from the time fixed for completion of the purchase.³ So, the purchaser is not liable for interest, when, upon finding a difficulty in the title, he immediately offers to rescind the contract, redeliver possession, and receive back the money advanced, which the vendor refuses.⁴ So, where the purchaser tenders the purchase money, and the vendor refuses it.⁵

4. Stipulation, that if, by reason of any unforeseen or unavoidable obstacles, the conveyance could not be perfected for execution before the day fixed, the purchaser should from that day pay interest, and be entitled to the rents and profits. The vendor did not show a good title till long after the specified day. Held, he was entitled to interest only from the time when a good title was first shown.⁶

5. Where the conditions of sale provide, that interest shall be paid from a certain day; if the purchase be not then completed, the purchaser is liable for interest, though the delay was caused by the vendor; otherwise, where there is no express stipulation.⁷

6. A purchase was to be completed on a certain day, when the purchaser was to have possession, and, "if from any cause whatever" the purchase-money were not then paid, he

¹ *Atty.-Gen. v. Christ Church*, 13 Sim. 214. See *Fludyer v. Cocker*, 12 Ves. 25; *Portman v. Mill*, 3 Jur. 356; *Enraght v. Fitzgerald*, 2 Dw. & W. 43.

² *Stevenson v. Maxwell*, 2 Sandf. Ch. 273.

³ *Jones v. Mudd*, 4 Russ. 118.

⁴ *Rutledge v. Smith*, 1 M'C. Ch. 403.

⁵ *January v. Martin*, 1 Bibb, 586.

⁶ *Monk v. Huskisson*, 4 Russ. 121, n.

⁷ *Esdale v. Stephenson*, 1 Sim. & St. 122.

was to pay interest. The transaction was delayed six months, for want of proper abstracts. Held, unless he gave up the rent, the purchaser must pay interest during that time.¹

7. But where these terms of purchase were used, and the vendor furnished an abstract, the terms of which required to be verified *aliunde*; held, he was not entitled to interest, though the purchaser had not demanded such verification.² But he is thus entitled, from the time at which all questions of title and conveyance are settled by the counsel of the parties; accounting for rent received, or which might have been received with due diligence.³

8. Where specific performance was prayed both by original and cross bill, after considerable delay upon the title; the rents were ordered to be received, and interest paid, from the time stipulated.⁴ So, a purchaser, taking possession without a conveyance, was compelled to pay interest; though the money was to be paid at a particular day, on the execution of the conveyance.⁵ So, a purchaser under a decree for sale, having accepted, and (on a report of an objection to the title, for which compensation was ordered,) returned, possession, must pay interest on the purchase-money from the time at which he took, or at which a title was shown under which he might have safely taken, possession, and is entitled to an allowance for prior, not for subsequent deterioration of the estate.⁶

9. The vendee is liable for interest, though the vendor be in default; unless he has not only kept the purchase-money idle, but notified the vendor of the fact.⁷

10. A purchaser, upon entering into possession, paid the amount of his purchase-money to his banker, and gave notice that he was ready to invest it in such manner as the

¹ *Cowper v. Bakewell*, 17 Eng. Law & Eq. 508.

² *Sherwin v. Shakspeare*, 23 Eng. Law & Eq. 199.

³ *Ibid.*

⁴ *Fenton v. Brown*, 14 Ves. 143.

⁵ *Fludyer v. Cocker*, 12 Ves. 27.

⁶ *Binks v. Lord Rokeby*, 2 Swanst.

⁷ *Brockenbrough v. Blyth*, 3 Leigh, 619.

vendor should require; but no answer was returned to that notice, and the purchaser, during the investigation of the title, kept in the hands of his banker a balance equal to the amount of the purchase-money, except for four days, when it was a little less. Held, the purchaser was not liable for interest, on the difference between his average balance during the period in question, and during the three preceding years.

11. A loss or deficiency of rents, arising while the vendor was in default by not completing the conveyance, the purchaser not having taken possession, or changed the receiver, was ordered to be made good out of the purchase-money in Court.²

12. Where a debtor sells land to his creditor in payment of the debt, he is liable for interest from the liquidation of the debt till a good title is made.³ (s. 20.)

13. With regard to the *rate* of interest to be paid by a purchaser, it has been sometimes held in England, that he shall be charged with 5 per cent. interest on the purchase-money unpaid.⁴ But, on the other hand, on the bill of a vendor, the purchase-money was decreed to be paid with 4 per cent. from the time it ought to be paid.⁵ And this is said to be the general rate, allowed in the English Courts of Equity.⁶ Thus, when purchase-money is to be paid, and a conveyance made, at a given time, but disputes arise as to the title, and the purchaser proposes to the vendor to lay out the purchase-money in exchequer bills till it is wanted, but the vendor returns no answer; and the money is so laid out; the vendee is at the risk, and is entitled to the benefit, of such purchase-money, with 4 per cent. interest.⁷ So, where the completion of a contract was delayed for thirteen years, and the property became deteriorated by dilapidations; held, the

¹ Winter v. Blades, 2 Sim. & Stu. 393.

² Blennerhasset v. M'Namara, 1 Moll. 81.

³ Hepburn v. Dunlop, 1 Wheat. 179.

⁴ Burnell v. Brown, 1 Jac. & Walk. 168.

⁵ Calcraft v. Roebuck, 1 Ves. 221.

⁶ Child v. Lord Abingdon, 1 Ves. 94.

⁷ Acland v. Gaisford, 2 Mad. 28.

loss must fall on the purchaser, as the state of the title was such, that he ought to have completed his purchase and taken possession; and he should pay interest at 4 per cent only from the time of filing the bill.¹ So, in a late case, real estate, in possession and reversion, was offered for sale at auction in lots, under condition that, on or before December 25, 1849, the vendors should confirm the master's report of purchases, and each purchaser pay the purchase-money into Court, and be entitled to rents from that day; and if, from any cause whatever, the money should not be so paid, it should bear interest from that day, at 5 per cent. Through fault of the vendors, the master's report was not confirmed till August, 1851. On motion, that a purchaser of a reversion in fee, being one of the lots, should pay the purchase-money into Court, with interest from December 25, 1849; held, interest should be paid from that time at 4 per cent.²

14. The purchase-money of an estate was to be paid by six instalments, with interest at 5 per cent., until the day of payment. It was subsequently agreed, that the last instalment, instead of being paid at the appointed day, should remain on mortgage, at $4\frac{1}{2}$ per cent., for fourteen years, but that the stipulations of the first contract, as to the previous instalments, should continue in force. Held, the reduction, from 5 to $4\frac{1}{2}$ per cent., was dependent upon the fulfilment of the terms of the first contract with respect to the prior instalments.³

15. It has been held, that the purchaser of a *reversion* (a) must pay interest from the time of purchase.⁴ Thus, where

¹ *Minchin v. Nance*, 4 Beav. 332.

⁴ *Trefusis v. Lord Clinton*, 2 Sim.

² *Wallis v. Sarel*, 13 Eng. Law & Eq. 138.

359; *Bailey v. Collett*, 23 Eng. Law & Eq. 263.

³ *Attwood v. Taylor*, 1 Mann. & Grang. 279.

(a) As to interest, in case of the sale of *timber* or *fixtures*, with reference to the increasing value by natural growth in the one case, and the deterioration arising from wear and tear in the other; see *Dart on V. & P.* 295-6; *Dyer v. Hargrave*, 10 Ves. 510; *Dakin v. Cope*, 2 Russ. 176.

a reversion expectant on an estate for life was decreed to be sold, B. was confirmed the best purchaser, and the order made absolute on the 1st of January, 1724; and in January, 1726, B. was ordered to bring his money into the bank. The life having dropped, held, if the life had dropped the next day after the report of B.'s being the best purchaser was made absolute, the purchase must have stood; and as from that time the life was wearing, so from that time the purchaser ought to pay interest.¹

16. But, on the other hand, it has been held that the purchaser of a future interest, after a term, shall not pay interest, or an increased price, for a part of the term elapsing before the purchase is completed, unless the delay be through his fault.²

17. The question of interest sometimes arises from an *investment* or *deposit* of the purchase-money.

18. The effect of a deposit by a vendee, with notice to the vendor, is said to be, to stop or determine the rate of interest. But such deposit does not operate as a tender and appropriation, transferring the risk as to the principal. Therefore, upon an investment in stock by the vendee, the title not being ready, and the vendor having notice, but returning no answer, the advantage by a rise, as the loss by a fall, is the vendee's.³ But where, pending a dispute concerning the title of land contracted to be sold, and to avoid the question of interest, the vendor authorized the purchaser to invest the price in funds in their joint names, if done by a certain day, which was done accordingly; the funds having risen in value; held, the vendor should have the benefit of it.⁴

19. A *purchaser* is not liable for interest *on the deposit*, even where he has rendered a suit necessary, by refusing to perform the contract, on the ground of an unfounded objection to the title.⁵

20. The purchaser, as well as vendor, may, under some

¹ *Ex parte Manning*, 2 P. Wms. 410.

² *Growsock v. Smith*, 3 Anstr. 877.

³ *Roberts v. Massey*, 13 Ves. 561.

⁴ *Burroughs v. Browne*, 15 Eng. Law & Eq. 166.

⁵ *Bridges v. Robinson*, 3 Mer. 694.

circumstances, make a claim for interest. Thus, where the sale is made in payment of a debt, the vendor must pay interest, from the time the debt is liquidated until he makes a good title; and the vendee is accountable for the rents and profits, from the time the title is perfected, until the contract is specifically performed.¹ (s. 12.) So, the agreement not being completed within the time specified, the purchaser shall be allowed interest for such time as the purchase-money has been kept dead for this special purpose.²

21. But, on the other hand, it has been held, that a purchaser out of possession cannot claim interest on the purchase money, though he has laid it aside till the vendor should show a good title, and it has thereby become unproductive.³ So also, that a party recovering back a deposit, paid on the purchase of real property, is not entitled to interest.⁴ So, if the contract is rescinded, but not for fraud, the purchaser having paid the price, and taken possession; the use of the money and that of the land are held to balance each other; and the decree should in general restore the money without interest, and the land without rents and profits. Otherwise, in case of valuable and permanent improvements by the purchaser, or deterioration of the property through his default; in which cases, a valuation, account, and settlement shall be made accordingly.⁵

22. Bill by a purchaser, for specific performance. The vendor, for fifteen years, had retained possession of the whole estate, and of one third of the purchase-money. Held, he should be charged with interest on one third of the rents and profits.⁶

23. Where an auctioneer, as agent for the vendor, agrees to sell, according to the conditions, by which the purchaser is to pay down immediately a deposit, and the auction-duty,

¹ *Hepburn v. Dunlap*, 1 Wheaton, 179.

² *Howland v. Norris*, 1 Cox, 59.

³ *De Vesme v. De Vesme*, 13 Jur. 1037. But see *Dart on V. & P.* 294.

⁴ *Bradshaw v. Bennett*, 5 Carr. & P. 48.

⁵ *Williams v. Rogers*, 2 Dana, 375.

⁶ *Burton v. Todd*; *Todd v. Gee*, 1 Swanst. 255.

and the residue of the purchase-money upon a day certain, on having a good title, and the vendor is to prepare and deliver an abstract; the auctioneer is not, upon a failure of the contract, in consequence of a defective title, personally responsible for interest upon the deposit and auction-duty, unless the money be demanded, or notice given to him that the contract has been rescinded.¹

24. So, an auctioneer, who receives a deposit from the purchaser, is a mere stakeholder, liable to pay the money at any time; and therefore, although he place the money in the funds at interest, he is not liable to pay such interest to the vendor, when the purchase is completed; though the vendor (without the concurrence of the vendee) gave him notice to invest the money in government securities.²

25. So, where a purchaser of an estate by auction deposited a sum with the auctioneer, as part of the purchase-money, until he should receive a good title, according to the conditions of sale; and no good title was made out; but the treaty was kept open with the auctioneer for four years, and no demand made on him for the deposit; held, the auctioneer was not liable for interest.³

26. But, where a vendor filed a bill for specific performance, but, not being able to make a good title, his bill was dismissed; held, he should return the deposit with interest.⁴ So, where a vendor omits to make out a good title, within the stipulated time, and the vendee dies, his executor may sue for loss of interest on the deposit-money, and the expense of investigating the title.⁵ The plaintiffs, purchasers of mines, having paid part of the purchase-money, and been let into possession, agreed to pay the residue by instalments, and in the mean time half-yearly interest on what should remain due. Having paid one half year's interest, but no portion of the remaining purchase-money, they filed their

¹ Gaby v. Driver, 2 You. & Jerv. 549.

² Harrington v. Hoggart, 1 Barn. & Adolph. 577.

³ Lee v. Munn, 8 Taunt. 45; 1 Moore, 481.

⁴ Anson v. Hodges, 5 Sim. 227.

⁵ Orme v. Broughton, 10 Bing. 533.

bill to set aside the contract. The vendor then recovered the next four half-yearly portions of interest by several successive actions, but, upon bringing his action for the fifth, was restrained by an order for an injunction in this suit. The terms of that order, dated the 28th of February, 1829, were, that, upon the plaintiffs' paying into Court the sum which was the subject of that action, the defendant should be restrained, &c., and that, upon their continuing from time to time to pay in the like sums half-yearly, the injunction should be continued to the hearing. Under that order, several half-yearly instalments of interest were paid in, and invested, and made to accumulate in the funds; but, under two subsequent orders, made at the instance of the defendant, for the purpose of enlarging publication, all further payments into Court were suspended until the hearing. The cause was heard in November, 1831, and in the following November judgment was given in favor of the plaintiffs; under which the accumulated stock was sold out, and paid to them, and the defendant was compelled to pay £9,766 for costs. In March, 1838, the House of Lords reversed this decree, and remitted the cause back to this Court, to do therein as should be just, and consistent with their reversal. Held, 1st, that the defendant was entitled to be repaid the sum of £9,766, but without interest.

2d. That as to the instalments of interest, which became due on the unpaid purchase-money, after the decree in the Court below, the defendant had no remedy in this suit, but must be left to his remedy at law.

3d. That the defendant was entitled to be repaid in this suit the instalments of interest, which became due between the orders for suspension and the decree of the Court below, but that he was not entitled to interest on those instalments.¹

26. Where payments have been made by a vendee, at different times, all exceeding the interest then due, and the

¹ *Small v. Attwood*, 3 Y. & Coll. 105.

decree, in a suit by the vendor for a specific performance, directs an account of what is due for principal and interest, *rests* shall be made.¹ So, where a sale is avoided, the purchase-money for which was secured by an instrument bearing interest, and interest had been paid thereon, such payments are to be considered as principal, and are to be refunded with interest.² So, a purchase being set aside for fraud, and the purchaser decreed to pay an occupation rent, receiving back his purchase-money with interest, there being a considerable excess of the rent above the interest; annual rents were directed to be made in the accounts, until the excess of the rent should liquidate the principal.³

27. The question of *usury* sometimes arises, in connection with the price of lands sold. Agreement to purchase houses for £431 10s.; possession to be given, and £200 paid immediately, the rest with interest at Michaelmas; but, if not then paid, the purchaser to pay "in lieu of interest upon the same a clear rent of £42 per annum," out of which was to be deducted interest for the £200 paid. Held, not usurious.⁴ Sale of an estate at a certain price, to be paid by instalments, with interest, at 6 per cent. Notes were given for these sums, compounded of the instalments, and that which was called interest. Held, the whole must be considered as purchase-money, and the bargain was not usurious.⁵

28. Questions sometimes arise, as to an order for, and the effect of, a payment of the purchase-money of lands *into Court*, and a claim of interest thereupon.

29. It is said, purchase-money paid into Court is the property of the vendor.⁶

30. Generally, a purchaser shall not retain possession, and also keep his purchase-money. But where he was willing to give up possession, and it was a question whether there was,

¹ Griffith v. Heaton, 1 Sim. & Stu. 271.

² Murray v. Palmer, 2 Sch. & Lef. 488.

³ Donovan v. Fricker, Jac. 165.

⁴ Spurrier v. Mayoss, 1 Ves. 527; 4 Bro. C. C. 28.

⁵ Beete v. Bidgood, 7 Barn. & Cress. 453; 1 Mann. & Gran. 324.

⁶ Gell v. Watson, 2 Sim. & Stu. 402.

or not, a subsisting contract, the Lord Chancellor refused to order payment of the purchase-money into Court.¹

31. Payment to the solicitor for all parties in the suit, is equivalent to payment into Court.²

32. Where a contract is cancelled by decree in Chancery for fraud of a party, a decree that he shall repay what he has received under it, with interest until paid, is proper.³

33. A purchaser, complaining that his conveyance did not comprise the whole of the property which he had contracted for, filed his bill for a conveyance of the remainder, and obtained an injunction against any suit for the purchase-money, part of which was afterwards ordered to be paid into Court, to abide the event of the suit. The bill being dismissed; held, the vendor was entitled to the residue of the purchase-money, and the interest upon it, to the time of payment, although the purchase-money in Court had not been laid out, and no interest accrued thereon.⁴

¹ *Morgan v. Shaw*, 2 Mer. 138.

² *Price v. North*, 2 Y. & Coll. 620.

³ *Perkins v. Rice*, Litt. Sel. 218.

⁴ *Humphries v. Horn*, 3 Hare, 276.

CHAPTER V.

PARTIES TO CONTRACTS.

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|--|---|
| 1. Necessity of parties ; uncertainty, &c.
6. <i>Joint</i> parties.
11. Husband and wife.
16. Representatives of a party deceased.
32. Trustees and <i>cestuis que trust</i> . | 34. Agents ; their authority ; it may be <i>verbal</i> ; construction of written powers, &c.
47. Form of the contract ; whether it binds the agent or the principal.
58. <i>Trust</i> , arising from an agency. |
|--|---|

1. To render valid a contract for the sale and purchase of lands, as in other contracts, there must be legally existing *parties*. It is not necessary that the parties should be expressly named. But, if there is nothing in the instrument itself, nor in the nature of the transaction, which shows who are the parties, the contract is void for uncertainty.¹

2. In some cases, however, the party to whom final conveyance is to be made, need not be at the time distinctly ascertained. Thus, a bond to convey lands to a board not *in esse*, for public purposes, in consideration of the location of a county seat of justice, is not void, by reason of the want of a grantee.²

3. A statute, creating a county, appointed commissioners to locate the seat of justice, in May, 1826, to receive donations in land, and to take bonds of persons proposing to give lands, payable to a board of justices, (whose appointment was not to take effect until June,) and their successors in office, which bonds the commissioners were required, by law, to deliver to the board of justices. A party, proposing to give lands, delivered to the commissioners a bond from himself to the board of justices to be thereafter organized, and their successors in office, for the conveyance of the lands,

¹ Webster v. Ela, 5 N. Hamp. 540.

² Sargeant's, &c. v. The State Bank, &c., 4 McLean, 339.

which bond was delivered by the commissioners to the justices. Held, the bond was not void, for want of obligees in existence at the time of its delivery to the commissioners, but was evidence in defence of an action of ejectment, brought by the heirs of the obligor, against a party who occupied the land twenty years under a title derived from the board of justices.¹

4. It is not always necessary, that the party binding himself by a contract should himself receive the consideration of such contract. But, in general, a party is not bound by an agreement relating to lands, where the consideration is *past*, more especially if another person had the benefit of such consideration, or if the contract is an unequal and unreasonable one.

5. Declaration, that a surveyor, in consideration of a sum paid him by the plaintiff, promised to furnish a land-warrant, and enter and survey for the plaintiff a piece of vacant land, in order that the plaintiff might obtain a grant thereof; that he wholly failed to make the entry; and that the defendant, his successor, in consideration of the promises of his predecessor, and the payment made to him by the plaintiff, and being required by the plaintiff to enter the land for him, agreed to furnish the necessary warrant, and enter it in the plaintiff's name in his office, and seasonably survey it, so that the plaintiff might obtain a grant; and that the plaintiff agreed to pay the defendant his fees for the survey. That the defendant failed to furnish a warrant and enter the land for and in the name of the plaintiff, but entered and surveyed it for another person, who had received a patent therefor. Held, as a count in assumpsit upon a special contract, the declaration set forth no sufficient consideration between the parties; and as a count in case, it set forth no such official misbehavior or neglect, as furnished a ground of action.²

¹ *Sargeant v. State Bank, &c.* 12 How. 371.

² *Hale v. Crow*, 9 Gratt. 263.

6. Where a person had purchased land at sheriff's sale, but had not paid the money, and afterwards became attainted, under an act of the legislature, held, the State could not, by paying the money, perform the condition, so as to make the deed, which had been delivered as an *escrow*, absolute, and thereby vest the estate in the purchaser; but he was to be considered as *civiliter mortuus*.¹

7. In this connection, it may be stated, that where the vendee *assigns* the contract, and the assignee takes possession, the vendor, though he cannot compel the assignee to pay the purchase-money, may, by virtue of his lien on the land, call on him to pay the money, or to surrender the land, or to have it sold for the benefit of the vendor. And where the administrators of the vendee assigned a contract for the purchase of land to the defendants, who covenanted and agreed to take up and cancel the contract, and to indemnify and save harmless the administrators from all damages, &c., which they might sustain by reason of the contract, &c.; held, that the administrators were entitled to specific performance of the covenants, and a want of assets could not be objected, *in limine*, to the relief sought.²

8. Contracts for the sale of lands may involve the rights and obligations of parties *jointly* interested. Thus, all the parties, bound by an executory contract to make titles, must join in the deed, in order to a complete performance. But all will be discharged, by the acceptance, on the part of the vendee, of something in satisfaction of the obligation, and in place of strict performance, from one alone.³

9. Two parties, each claiming title to the same land, derived from distinct sources, but neither of which could be perfected without a confirmation from the government; entered into a written and sealed agreement, fully reciting

¹ *Simonds v. Catlin*, 2 Caines, 61, 64.

³ *Johnson v. Collins*, 20 Ala. 435

² *Champion v. Brown*, 6 Johns. Ch. 398.

But see *Coe v. Harrahan*, Mass. S. J. C. Suffolk, March, 1857.

their respective claims, and providing that they should share equally if the title were confirmed; if not, in the money awarded by government, in lieu thereof. The title was confirmed, and a title granted to the defendant, one of the parties, in his own name. The other having in the mean time died, his heirs file a bill for specific performance. Held, as the agreement fully recited the respective interests of the parties, the defendant could not set up in defence an inequality of interest at that time.¹

10. Bill for specific performance. By a written contract, the defendant agreed to repair the plaintiff's mill, building, fences, &c., and the plaintiff to sell to the defendant, on completion of such repairs, one undivided moiety of the premises. It was further agreed, that the parties should then form a partnership, to work the mill for a year, when, if the plaintiff should elect to withdraw, the defendant should pay him a certain sum for the premises; otherwise, the partnership to continue for five years. Held, not to be a case for specific performance.²

11. Agreement under seal, between the plaintiffs, husband and wife, and the defendant and five other persons, interested in certain real property, that "the said parties, namely, (the plaintiffs) on the one side, and (the defendant and the other five persons) on the other, shall," at a time and place to be appointed, "bid against each other for the right to take said estate, and thereupon said party obtaining the right to take the same shall receive a conveyance of the interest of the other party therein, and shall pay therefor to the other party the appraised value of the interest so conveyed, together with the sums bid for the right of taking said estate, in cash, upon the delivery of the deed." The plaintiffs bring an action upon this agreement against the defendant alone, alleging that at the time and place appointed "the parties to said agreement bid against each other as aforesaid, and (the defendant) did bid for said right" a certain sum, "being the

¹ *Hunt v. Thorn*, 2 Mich. 213.

² *Reed v. Vidal*, 5 Rich. Eq. 289.

highest sum bid therefor, and thereupon became entitled to take the interest of the plaintiffs therein, and became bound to take the same and to pay therefor the amount of said appraisal and of said bid; and afterwards the plaintiffs executed a deed of the interest of said female plaintiff therein, and tendered the same to the other parties to said agreement, yet the defendant wholly refused to accept the same or pay the consideration thereof." Held, on demurrer, the action could not be maintained. Shaw, C. J., says: "The result" of the terms of the agreement is, "that the party owning four fifths of the estate should give the other party, for his one fifth, more than the appraised value of the whole. It may be so, and the party may be bound; but if so, it must be by force of strict law, and cannot be aided by equitable considerations. The agreement exactly defines the parties who are to bid against each other—the plaintiffs on the one side, and the defendant and five others on the other. The declaration does not aver that the parties bid, but that the defendant bid. This is not conformable to the contract. If the defendant bid for his party, then the whole were purchasers, and the suit should have been against them all. But the averment is, not only that the defendant made the bid, but that he became bound, and the plaintiffs executed and tendered a deed to him. The thing to be bid for and conveyed was the interest of Pierce and wife in the real estate; whereas the deed was of the interest of the female plaintiff." ¹

12. The question of parties sometimes arises, in connection with the respective rights and obligations of *husband and wife*.

13. Upon this subject the general rule is, that *femes covert* cannot bind their interest in lands, except in the precise form prescribed by law.² Therefore an agreement by a *feme covert*, even with the assent of her husband, for the sale of her real estate, is void, and cannot be enforced in

¹ *Pierce v. Harrington*, 1 Gray, 595. ² *Dunlap v. Mitchell*, 10 Ohio, 117.

Chancery against her.¹ But the husband has such an interest in lands owned in fee by the wife, that he can give a lease thereof for a term of years, which will be valid during the coverture, at least; and an agreement to give such a lease, if not otherwise objectionable, may be enforced in a Court of Chancery.² And where one agrees to sell land, and to execute and deliver a warranty deed thereof; his wife must join in such deed.³

14. A., and B. his wife, conveyed her land to C., the daughter of B., and wife of D., by a deed of gift; after which A. was imprisoned on an execution in favor of E., and held in close confinement. With a view to obtain his liberation, C. agreed with D., that, if he would assume the debt to E., by giving his note for the amount, she would pay it from the avails of the land so conveyed to her. D. gave his note accordingly, and A. was liberated. Immediately afterwards C. died; and D., having paid the note, exhibited to the Court of Probate his claim for the money so paid, against her estate. Held, 1, that the agreement between C. and D., having been executed on one part, was not within the Statute of Frauds, and might be proved by parol; 2, that if D. had an equitable claim, which a Court of Chancery, on suitable process, with the parties in interest before it, could enforce, it was not competent to a Court of Probate to allow it; but, 3, that the agreement, having been made by a feme covert with her husband, without benefit to her, was void, and could not be enforced anywhere.⁴

15. Where an agreement does not designate the person to whom the consideration is to be paid, the law raises an assumpsit in favor of those who are the meritorious cause of action, or from whom the consideration moves. Thus, the consideration being the sale of the wife's inheritance, in the absence of an express promise, the law raises one to the husband and wife, on which the husband may sue, either in his

¹ *Butler v. Buckingham*, 5 Day, 492.

² *Eaton v. Whitaker*, 18 Conn. 222.

³ *Pomeroy v. Drury*, 14 Barb. 418.

⁴ *Watrous v. Chalker*, 7 Conn. 224.

own name, or in their joint names. Even if there was an express promise to the husband, the wife might be joined as plaintiff. But a feme covert cannot be joined, in an action to recover the price of property sold by her, and which belonged to her before coverture, or unless there be an express promise of payment to her.¹

16. A baker was desirous of disposing of his shop and the good-will of his business, and in consequence an advertisement was inserted in a newspaper, stating that the house was doing twelve sacks a week. The advertisement was inserted by the broker, in consequence of a conversation with the baker's wife, who managed the business for him, in which conversation she told the broker that they did between nine and ten sacks a week, upon which he said, "We must make it twelve for the paper." In consequence of the advertisement, a person desirous of purchasing went to the wife and said to her, "Are you really doing any thing like this business?" to which she replied, "Yes, we are doing eleven sacks," and appealed to the man in the shop, who confirmed her statement. The baker himself did not appear at all in any part in the transaction, except that he received the purchase money, and paid the broker his commission. In an action brought by the purchaser on the representation contained in the advertisement, it was held, that the baker was personally and individually answerable in damages, inasmuch as though he did not make any representation himself, yet he made the wife his agent, and was bound by her statements.²

17. A., the wife of a bankrupt, who was abroad, without his consent, or a legal ratification by herself, conveyed her own lands to trustees under his sequestration. Upon a sale of these lands by public roup, the vendor, by the articles of roup, undertakes to execute to the purchaser a valid, irredeemable disposition of the subjects, as described in his own

¹ Higdon v. Thomas, 1 Harr. & Gill, 139.

² Taylor v. Green, 8 Carrington & Payne, 316.

or constituent's title thereto ; also to deliver certain specified deeds, &c., described as "all the title-deeds of the property in his custody." Upon a suit by the vendor for the purchase-money, and a proceeding for suspension by the vendee ; held, it is not such a title as a purchaser is bound to accept, and that the title is not limited by the terms of the articles.¹

18. A married woman, with the concurrence, and in the presence of her husband, signed an agreement in writing to grant a lease ; all parties believing that she was entitled to two thirds of the property for her separate use, and that the remaining one third belonged to her brother in India, whose concurrence it was represented that she could procure. It was soon afterwards discovered, that the wife was entitled to one fourth only for her separate use, to another fourth absolutely ; that another fourth had belonged to her deceased sister ; and that the remaining fourth belonged to the brother. The fourth which had belonged to the sister was purchased by the husband soon after this discovery. Upon a bill for specific performance against husband and wife ; held, there could be no decree against her *in personam* ; and her agreement did not bind the husband, as to the interests in the property which he had at the date of the agreement, or which he afterwards acquired.²

19. Contracts for the sale and purchase of lands are sometimes brought in question, *after the death* of the contracting parties. Thus, such a contract may be enforced, though, by reason of the vendee's death, the execution of bonds and a mortgage required by the contract is impossible, as the heirs or residuary legatees may carry it out. But, it is said, in case of the death or bankruptcy of the purchaser, it perhaps may be optional with the seller to rescind the contract, or to demand specific performance ; and, if the defendants are unable or unwilling to perform, perhaps the estate may be sold, and the defendants ordered to pay any difference in the

¹ Dick v. Donald, 1 Bligh. N. S. 655. ² Aylett v. Ashton, 1 Myl. & Cra. 105.

amount of the purchase-money.¹ So, it is held, that, to enforce specific performance of a parol sale of land by one deceased, the precise terms must be proved. The vendee must also have taken exclusive possession in pursuance of the contract, and in the lifetime of the vendor.²

20. If the obligee has fulfilled his part of the contract, his administrator may sue for a breach, though the purchase-money has not been paid.³

21. An averment in a declaration, that a vendor has power to sell, as executor, is sufficient, without an allegation that the title of his testator is good.⁴

22. A. made a writing, in these words, signed by himself: "This is to certify that I engage to my son B. the farm on which he now lives, and, should Providence determine otherwise, he is to receive of my estate \$1,000,—\$500 for the improvements made on the farm on which my son C. lives, and \$500 for money to be paid to D., widow of my deceased son." After the death of A., B. brought assumpsit against A.'s executor, alleging that A., by the contract, promised to give to B. the farm, and, should Providence determine otherwise, that B. should receive from A.'s estate \$1,000; and that A. did not give the farm to B., but that he gave and devised it to C. Held, the writing was an intelligible and valid contract, and the action could be maintained.⁵

23. Where a bond for conveyance has been given, and, after the death of the obligor, his administrator executes a deed, by virtue of the statute of North Carolina, any equitable defence against the bond may be set up against the deed.⁶

24. The decree of a court of competent jurisdiction, ordering an administrator to convey title to land, which decree purports to be founded on a title-bond executed by the intestate, is evidence that he did execute it.⁷

¹ *Tiernan v. Roland*, 15 Penn. 429.

² *Sage v. M'Guire*, 4 Watts & Serg. 228, 229.

³ *Allen v. Greene*, 19 Ala. 34.

⁴ *Adams v. M'Millan*, 7 Porter, 73.

⁵ *Rue v. Rue*, 1 New Jersey, 369.

⁶ *McCraw v. Gwin*, 7 Ired. Eq. 55.

⁷ *Holt v. Clemmons*, 3 Texas, 423.
See *Holt v. Payne*, 3 Texas, 478.

25. In a suit for title, on such bond, it is not essential to the validity of the decree, or the title executed under it, that the heirs of the intestate should have been made parties.¹

26. The owner of land declared in writing, that he held the same in trust for A., his heirs, and assigns, subject to his own lien for advances thereon, and that he was to convey and would convey to A., or his representatives, upon reimbursement of his advances. A. having died, one of his creditors took out letters of administration, inventoried his interest in the land, and, under a license from the Probate Court, sold and conveyed the same for payment of debts. The administrator subsequently purchased the interest so sold of such purchaser, received a conveyance thereof, and then brought his bill in equity against the trustee, for a conveyance upon paying the advances thereon. Held, the plaintiff might maintain his bill as the representative of A., if not in his own individual right.²

27. The *heirs* of a vendor, though not named in the contract, and whether adult or infant, are bound, and may be compelled to execute it, to the extent of their assets.³ But, in New York, generally, the heir will not be compelled to enter into personal covenants, in fulfilment of the ancestor's contract.⁴

28. Bill for specific performance of a contract to convey, against the heirs of the vendor, one of whom was an infant. The contract stipulated for a good and sufficient deed, free of all incumbrances, but did not name the heirs. The vendor left a widow. Held, the infant was bound to convey, without covenants, and the other heirs with covenants against their own acts, on payment of the stipulated price, deducting from each payment a proportionate share of the value of the dower.⁵

29. A parol agreement for the sale of land will not be

¹ *Holt v. Clemmons*, 3 Texas, 423.
See *Holt v. Payne*, 3 Texas, 478.

² *Dumpe v. Hayward*, 2 Cush. 429.

³ *Hill v. Ressegien*, 17 Barb. 162.

⁴ *Ibid.*

⁵ *Ibid.*

enforced specifically against the heir of the vendor, though he had given instructions in writing, stating the terms, to an attorney, to draw the deeds.¹

30. The heirs of a vendee, who had a parol contract for 800 acres of land, and had paid the whole price, sold and conveyed 100 acres to the complainant. Held, he could not compel the heirs of the vendor to convey to him the 100 acres.²

31. When a bond for title shows that the title is in a stranger, from whom the obligor does not procure a conveyance to the obligee, nor himself obtain it; the obligee's heir does not inherit the land, nor can he maintain a suit upon the bond in his own name, whether a breach of it occurred before or after the obligee's death.³

32. If a vendor leaves several heirs, one of whom is a minor, the purchaser is not bound to accept a deed from the adult heirs, and a bond of the guardian of the minor with surety, conditioned for the minor's conveyance when he shall come of age.⁴ So, in a suit demanding specific performance of a contract, by conveying lands in Ohio, stipulated to be conveyed as the consideration for other lands sold in Kentucky, or, in lieu thereof, requiring indemnification by the payment of money; held, all the co-heirs of the vendor, deceased, ought to be made parties to the bill, or the death of one of them not a party ought to be proved.⁵ But, where a vendor dies before performance of the contract, leaving an only child as his heir, who is a lunatic; equity may decree a specific performance, and direct the committee of the lunatic to execute all necessary conveyances.⁶

33. A bond by an administrator to convey real estate of his intestate, in contemplation of a sale under a surrogate's order, is void.⁷ So, if commissioners for selling the real

¹ *Givens v. Calder*, 2 Desaus. 171.

² *Lord v. Underdunk*, 1 Sandford, 46, 48.

³ *Allen v. Greene*, 19 Ala. 34.

⁴ *Barickman v. Kuykendall*, 6 Blackf. 21.

⁵ *Morgan v. Morgan*, 2 Wheat. 290.

⁶ *Swartwout v. Burr*, 1 Barb. 495.

⁷ *Herrick v. Grow*, 5 Wend. 579; *M'Dermid v. M'Cartland*, Hardin, 18.

estate of one deceased give a bond, conditioned to make or cause to be made a title in fee simple, which exceeds their authority, and fail to bind the estate of the deceased; they are bound personally.¹

34. Questions have sometimes arisen, in reference to the liability of *trustees* and *cestuis que trust*. Thus, the owner of an estate having agreed with the *cestui que trust* of an adjoining estate, to build a new partition wall between them, in place of the wall then standing, for the benefit of both, and having built the same accordingly, on a promise by the latter that he would pay for one half of the wall, if at any future time he should have occasion to use it for any other purpose than that for which the old one was then used; the trustees of the last-mentioned estate subsequently sold and conveyed the same, without making any mention of the partition wall, but with the consent of the *cestui que trust*, signified by his signing and sealing the deed; and the purchaser subsequently made use of the wall for a different purpose from that for which the old one was used. Held, the agreement on the part of the *cestui que trust* was merely personal, and his assent to the deed was not a *use of the wall* by him, within the meaning of his agreement.²

35. Questions have also arisen from the *alienage* of a purchaser of real estate, and his consequent inability to acquire an indefeasible title. Upon this point, it has been held, that alienage of the vendee will not entitle the vendor to a decree for rescinding the sale, though it may afford a reason for refusing specific performance, as against the vendee.³ But, if the parties have not an adequate remedy at law, the vendor may be considered as a trustee, for purchasers under a sale by order of Court for the benefit of the vendee.⁴

36. But, with regard to *the parties* to a contract for the sale and purchase of lands, the questions most frequently arising are those which grow out of the relation of *principal*

¹ *Whiteside v. Jennings*, 19 Ala. 784.

² *Jenkins v. Spooner*, 5 Cush. 419.

³ *Hepburn v. Dunlap*, 1 Wheat. 179.

⁴ *Ibid.*

and agent. Of course, the most important inquiry under this head is, the existence and source of the authority to act for one person, which is claimed and exercised by another. And the principle seems well settled, that, although contracts for the sale and purchase of lands must themselves be in writing, yet verbal authority to an agent to sell lands is sufficient.¹ (a) But verbal directions to an agent, who has a power of attorney to convey lands, can neither give new authority to convey, nor enlarge that contained in the power.²

37. An authority to sell and convey lands for cash includes the right to receive the purchase-money.³ So, where A. engaged B. to hire a certain piece of land for him, at a certain

¹ Johnson v. M'Gruder, 15 Mis. 365; ² Spofford v. Hobbs, 29 Maine, 148.
Coleman v. Garsigues, 18 Barb. 60; ³ Johnson v. M'Gruder, 15 Mis. 365.
Marston v. Roe, 8 Ad. & Ell. 14.

(a) But the signing, sealing, and delivery of a deed by an agent will not be valid, unless authorized by an instrument under seal, or done in the actual presence of the principal. Kime v. Brooks, 9 Ired. 218. And the principle stated in the text has not been uniformly recognized. Thus, it has been held, that the power of an agent to *rent* lands must be proved by other testimony than his own. If there is a written power, it should be produced; if it is burnt or lost, the contents should be proved. Neither shall the agent's leasing for some years and collecting the rents, and the acquiescence of the owner, be presumptive proof of the power. Meredith v. Macoss, 1 Yea. 200.

A question arose, whether the defendant had given a written authority to one A. to dispose of certain premises which the plaintiff alleged he had bought under that authority. To prove that a written authority was given, but had been mislaid, the plaintiff offered A. as a witness. Held, he was not competent, unless the contents of the writing were proved by other witnesses; and then he might be allowed to show how he had executed his instructions. Nicholson v. Mifflin, 2 Dall. 246.

So, it has been held, that a *sale* of land by an agent, under a parol authority, is void; but, if the sale be subsequently affirmed by the principal, he, and those who claim under him, are estopped from recovering the land in ejectment, even though a deed to the agent himself, under which he undertook to sell, was forged. Vanhorn v. Frick, 6 Serg. & R. 90.

It is said, a parol sale by an agent is as valid as a parol sale by a principal. Ibid.

rent or at any rent; and B. effected the lease, but the lessor, being unwilling to give credit to A., trusted B., and B. paid the rent; held, this was a general agency, the payment by B. was within the object of it, and A. was liable to an action for the money paid, without demand.¹ But, where baron and feme, having joint power to sell her estate, authorized an agent to sell by auction, and he sold by private contract for more than the price they required; held, the buyer could not compel specific performance.²

38. A power of attorney to sell lands, "for the purpose of making actual settlements thereon," and "to sign, seal, and deliver sufficient deeds, conveying the land in fee simple, with the several covenants and a general warranty;" leaves it to the judgment of the attorney to determine, whether the purchasers buy for this purpose, and, in the absence of fraud, the conveyance will be valid, although the land was purchased, not for settlement, but on speculation.³

39. A land-broker, having authority, if he could sell land for cash on delivery of the deed, "to close the bargain," signed an agreement in the name of the principal, to sell the land for the sum fixed in cash on delivery of the deed, and also that the principal should give a warranty deed, with full covenants and a perfect title at any time on demand within thirty days. Held, the principal was not bound, the express authority being merely "to close the bargain," and not involving the right, in case of lands, to sign a contract; and the general agency of land-brokers not being any more extensive.⁴

40. Where a power of attorney authorized the agent "to contract for the sale of, and to sell, either in whole or in part, the lands and real estate so purchased," and "on such terms in all respects as he shall deem most advantageous," and "to execute deeds of conveyance necessary for the full and perfect transfer of all our respective right, title, &c., as suf-

¹ *Irions v. Cook*, 11 Ired. 203.

² *Daniels v. Adams*, AmbL. 495.

³ *Spofford v. Hobbs*, 29 Maine, 148.

⁴ *Coleman v. Garrigues*, 18 Barb. 60.

ficiently in all respects as we ourselves could do personally in the premises;" held, that these expressions, aided by the situation of the parties and the property, the usages of the country, the acts of the parties themselves, and any other circumstances having a legal bearing upon the question, gave to the agent the power to enter into a covenant of seizin.¹ [McLEAN, J., dissenting.]

41. A proprietor of lands, who had sold lots for which the pay was still due, and contracted to sell others, granted a power, "to collect and receive all sums of money due to him for said lands from purchasers, and to execute all such contracts as the sales may require." Held, the power did not authorize new contracts for the sale of other lands.²

42. A contract, by which a right of preëmption is given to a party for a certain time, at a fixed price, on a *bonâ fide* expectation that he may become a purchaser, will not constitute him an agent of the vendor, although he sells his interest in the contract at an advanced price before the expiration of the term. But if the right of preëmption is given, not with an expectation that the party will become a purchaser, but solely for the purpose of enabling him to make sale of the thing, and to get his compensation in the advanced price, this will render him the agent of the owner, and the owner responsible for his acts.³

43. Under a power to "mortgage or convey for the payment of debts," the property may be conveyed to a trustee, with authority to sell for the satisfaction of debts.⁴

44. Where a person for himself, and as agent for another, purchases land on their joint account, but for a higher price than he is authorized to pay, but without any collusion with the vendor, or knowledge on the part of the vendor that he is exceeding his authority; the other purchaser must either wholly adopt or wholly repudiate the transaction.⁵ But where an agent, holding a power of attorney to sell lands,

¹ *Le Roy v. Beard*, 8 How. U. S. 451.

² *Calef v. Foster*, 32 Maine, 92.

³ *Mason v. Crosby*, Davesis, 303.

⁴ *Gimell v. Adams*, 11 Humph. 283.

⁵ *Crawford v. Barkley*, 18 Ala. 270.

makes a conveyance not authorized by the power, the taking back of a mortgage and notes, neither of which contain any specific reference to the deed, nor any thing inconsistent with the attorney's want of authority, and the receiving by the principal of the money paid upon the notes, will not operate as a ratification of the conveyance, nor as an estoppel from denying the validity of the deed.¹

45. An act, authorizing the auditor to rescind contracts for the purchase of lots, where none of the purchase-money had been paid, and he was satisfied that the purchasers and their sureties were insolvent; applied only to the cases expressly specified, and did not authorize the auditor to cancel a contract for a lot, the purchaser of which was not insolvent, and whose note was not, at the date of the rescission, the property of the State.²

46. A purchaser alleged, by his answer to a suit for specific performance, that he acted as a puffer in bidding for one lot, and also for another lot, which was knocked down to him; and that he therefore purchased the lot, and signed the agreement for the purchase, as the agent of the vendor; but the statement, in his depositions, of the circumstances attending the signature, was somewhat different from that in his answer, and he had signed an order on his attorney for payment of the deposit-money. Held, there was not sufficient evidence of agency, and the defendant was held to have purchased on his own account.³

47. Questions frequently arise, from the form of execution of a contract made by an agent, as to the respective liabilities of the principal and agent. Upon this subject, the general rule is, that a sealed covenant for the sale of land, made by an attorney in fact, must be executed in the name of the principal by A. B., his attorney; if the attorney affix only his own name, the covenant is void, although in the body of the instrument it be stated that it is the agreement of the

¹ *Spofford v. Hobbs*, 29 Maine, 148.

² *The State v. Mayes*, 23 Miss. 516.

³ *Bennett v. Smith*, 10 Eng. Law & Eq. 272.

principal by A. B., his attorney, that the principal covenants, &c., and in the *in testimonium* clause that A. B., as the attorney of the principal, hath set his hand and seal. The principals not being bound, the other party is discharged; and no act subsequently done by the covenantor can give validity to the covenant without the assent of the covenantee. But when the agent as such does an act *in pais*, though in his own name, or enters into a commercial or other contract, not under seal, without subscribing the name of the principal, the latter is bound by the act of his agent.¹

48. Although a title-bond, executed by an agent, be insufficient to bind the principal at law, yet, if the agent were authorized and intended to bind him, a specific performance may be decreed in equity, there being a sufficient note or memorandum within the Statute of Frauds.²

49. Two tenants in common of a tract of land, which was divided into two lots, having put the same up for sale at auction, one of them, without previous knowledge or agreement of the other, bid off and became the purchaser of a lot, through an agent, who, in his own name, but declaring that he was acting therein as the agent of such purchaser, signed a memorandum, acknowledging to have purchased such lot, and agreeing to comply with the terms of sale. In a bill in equity, by the other tenant, to compel his co-tenant to receive a deed from him of an undivided moiety of the lot, and to pay therefor one half of the auction price; held, there was no sufficient contract in writing, or memorandum of such contract.³

50. A. advertised lands to be let for three lives or thirty-one years. B. made proposals for them, which were accepted, and an agreement executed, between B. and the agent of A., in which the term was not mentioned. Held, A. was not bound by the agreement. Also, there being no reference in the agreement to the advertisement, that parol evidence could

¹ *Towusend v. Corning*, 23 Wend. 435.

² *Johnson v. M'Gruder*, 15 Mis. 365.
See *Wood v. Goodridge*, 6 Cush. 117.

³ *Gill v. Bicknell*, 2 Cush. 355.

not be received to connect the one with the other, so as to ascertain the term.¹

51. Bill for specific performance. One of the defendants purchased lands at auction, declaring himself the agent of the other, in his presence; but the solicitor of the vendor, the plaintiff, required the agent to sign the agreement, and refused to accept the name of the principal; but subsequently communications took place between him and the principal, respecting the title. Held, the plaintiffs had not substituted the principal for the agent, but the agent was personally liable.²

52. On sale of premises by auction, the memorandum of the mutual agreement was signed by the auctioneer, as agent for the purchaser, and by the vendor's attorney, subscribing himself "as agent for the said S. S.," the vendor. The purchaser paid his deposit to the attorney, who gave a receipt signed by himself as "agent for S. S." The sale going off through the vendor's default, and the deposit not being returned; held, the purchaser could not bring an action of money had and received against the attorney, he not being a stakeholder, but merely the vendor's agent, and payment of the deposit to him being payment to the vendor.³

53. The highest bidder for certain lands sold by auction, and the plaintiff, the mayor of a corporation, on behalf of himself and the rest of the burgesses and commonalty of the borough, the vendors, signed a contract, in which they mutually promised to fulfil the conditions of sale on their respective parts. The conditions stated the title of the corporation, and stipulated that they should convey, and might resell on default. The only act therein mentioned, to be done by the plaintiff, was the receiving the deposit. Held, the plaintiff could not maintain an action in his individual capacity against the purchaser for breach of this contract.⁴

54. One party, who would exonerate himself on the ground

¹ *Clinan v. Cooke*, 1 Scho. & L. 22.

² *Chadwick v. Maden*, 12 Eng. L. & Eq. 180.

³ *Bamford v. Shuttlewoeth*, 4 Ad. & Ell. 926.

⁴ *Bowen v. Morris*, 2 Taunt. 374.

of agency, ought to show that he communicated it to the other, and acted as agent, so as to give a remedy over against his principal.¹

55. The defendant, by a written agreement, expressed to be made by himself on behalf of A. B., of the one part, and the plaintiff of the other part, stipulated to execute a lease to the plaintiff of premises proved to belong to A. B. Held, the defendant was personally liable.²

56. An alleged principal, though not originally bound, may so ratify a sale or purchase, as to become liable for its completion. And, where a sale made by an agent is ratified by his principals, the agent's representations, made at the time of the sale, bind his principals.³

57. Upon the general principle which governs the case of *trusts*, (see *Trust*,) the law does not permit an agent to act in that capacity for his own benefit, or to appropriate to himself the advantage which rightly belongs to his principal. Thus, one who assumes to act as agent in redeeming land sold for taxes, and obtains a title in his own name, will be held to answer to those for whom he has assumed to act, by a bill in equity for an account, and to compel a reconveyance.⁴ So, one employed to bid for another at a mortgage sale of land cannot purchase it himself, nor through another, for his own benefit.⁵ So, if an agent, appointed to sell and convey lands, cause part of them to be conveyed to himself, upon application within reasonable time by the heirs of the principal, equity will order a reconveyance to them, unless the principal had ratified the sale.⁶

58. An agent having purchased the property of his principal at a sheriff's sale, the Circuit Chancellor refused to set aside the purchase, but ordered that he account for "the true value" of the property. Held, this meant the true value at the time of sale.⁷

¹ *Maure v. Hefferman*, 13 Johns. 58.

² *Norton v. Herron*, Ry. & M. 229.

³ *Doggett v. Emerson*, 3 Story, C. C. 700.

⁴ *Schedda v. Sawyer*, 4 McLean, 181; *Matthews v. Light*, 32 Maine, 305.

⁵ *Moore v. Moore*, 1 Seld. 256.

⁶ *Sturdevant v. Pike*, 1 Cart. 277.

⁷ *Raness v. Wall*, 5 Rich. Eq. 143.

59. The rule in question more especially applies, where a party combines the characters of trustee and agent for his fellow-trustees. Thus, a purchaser, (being a trustee, acting on behalf of himself and others, his co-trustees, and of the *cestui que trusts*,) was ordered to pay the purchase-money into Court; the agreement having been entered into in the name of himself alone; upon affidavits, that the plaintiffs (the vendors) had no notice of his acting for others, and of acts of ownership committed since possession given to him under the agreement; in opposition to the answer, alleging notice and denying any acts of ownership by himself, or by any other person, to his knowledge.¹

¹ Crutchley v. Jervingham, 2 Merivale, 502.

CHAPTER VI.

SALES BY AUCTION.

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|--|--|
| 1. Forms of sale.
2. What is an auction; effect of a bid; separate estates; <i>letting</i> by auction.
12. <i>Puffing</i> .
24. Combination of purchasers, to reduce the price. | 33. Rights and duties of an auctioneer.
42. Statute of Frauds.
50. Parol evidence.
53. <i>Deposit</i> . |
|--|--|

1. IN the natural succession of topics, we now propose to consider *in what form* contracts for the sale and purchase of lands are required by law to be made. There is, however, a particular class of sales, to which the general rules upon this subject do not directly apply, and which may therefore be more properly treated of, before proceeding to a statement of those rules, to wit, *Sales at Public Auction*. (a) These have become so frequent and important a mode of disposing of real estate, and are at the same time so distinguishable in form and effect from mere private transfers, as to have called for the establishment of a set of legal principles quite peculiar to themselves, and of great practical consequence. Auctioneers being also *agents*, the subject naturally follows that of a sale and purchase by agents, which was considered in the last chapter.

2. An auction is defined, as "a public sale of property to the highest bidder."¹ It may be by public outcry or other-

¹ 1 Boun. Law. Dict. 141.

(a) In many cases, this is the only lawful mode of sale. Thus, an agent or trustee, simply authorized to sell by public auction for a certain sum, cannot, for any price, sell at private sale. *Daniel v. Adams*, Ambl. 495; 8 Jur. 206.

wise. (a) The essential part, is the selection of a purchaser from a number of bidders. But questions have sometimes arisen, as to the precise elements necessary to constitute this peculiar description of contract.

3. The plaintiff, an auctioneer, was employed to sell lands, &c., subject to the following (among other) conditions of sale: 1. "That the vendors having caused a notice to be delivered to the auctioneer, authorizing one A. to bid for the premises mentioned in a certain particular, the same should not be considered as sold, *unless the price bid by any other person or persons should exceed the sum bid by the said A.*" 2. "That the *purchaser* of each lot should pay to the auctioneer the duty granted to his Majesty on the sale of real estates, over and above the purchase-money for each lot." The conditions were read by the plaintiff, in the hearing of the defendant, a bidder. Defendant bid £4,000 for a lot, which bidding was then taken down by the plaintiff in his catalogue, *without adding the name of the defendant*. The plaintiff postponed the sale, and went to other lots, saying aloud, he did so, "to give gentlemen time to consider." In

(a) A woman remained silent during the whole time of a sale, but gave a glass of brandy to every bidder; and, upon the breaking up of the sale, the person receiving the last glass was taken aside and declared the purchaser. Held, an auction. 1 Dow. 115.

At an auction sale, the vendor invited each bidder to put two sums upon a slip of paper, and, on comparison, the highest bidder to be declared the purchaser at the lowest of his sums, if exceeding the highest bid of any other person. Held, an auction, under St. 19, Geo. III. ch. 56, and the penalty incurred for selling without license, though the purchase was never completed. *Rex v. Taylor, McLel.* 362. (p. 74, n.)

The agent of the owner of an estate put it up at auction, first in a number of lots at certain prices. No bid being obtained, he offered it in a smaller number of lots, at other prices. Still obtaining no bid, he withdrew the property. Held, this was not a bidding of the owner by his agent, which subjected the party to payment of a duty, for want of notice to the auctioneer of his agency. The *upset* price was merely the *terminus* from which a bidding commenced. *Cruso v. Crisp*, 3 E. 337.

less than an hour, he declared, in defendant's hearing, that he was going back to the lot, and to defendant's bidding, that it was an *open sale* as to the same lot, and that he would give two minutes time to consider; and unless there was an advance, he would knock it down to the defendant at £4,000. The defendant then said, but not so loud as to be heard by the plaintiff, that he would not have it. There being no advance, the lot was knocked down to the defendant; who thereupon refused to complete the purchase, or to sign a memorandum. A. had made no bidding. Held, *assumpsit* did not lie to recover the auction duty, which the plaintiff had paid to the crown, against the defendant, as *purchaser*, or as *highest bidder*, or as *a higher bidder* than A., according to the condition of sale.¹

4. The agent of the owner of an estate, to be sold at auction, attends at the place and time of sale; mentions the upset price, but not bidders; and gives notice that he will be ready to treat for a sale by private bargain. Soon after, he is called into a private room by some of those who attended at the public meeting, and they give him offers in writing. He engages, before inspecting the offers, that the highest offer shall be accepted; and it is accepted accordingly. Held, that where the contract is with various persons, with an engagement to let the highest bidder be the purchaser, or to accept the highest offer, it is a sale at auction for the purposes of the act, of 17th Geo. III. c. 50, and 19th Geo. III. c. 56.² (a)

¹ Jones v. Nanney, McClelland, 25.

² Walker v. Advocate-General, 1 Dow. 111.

(a) A sale was appointed for two certain days, by public advertisement, for the disposal of a house and furniture; but, some of the furniture not being then sold, an announcement was made to the company assembled, that at a future day then named for that purpose, the whole of the remainder would be sold. The persons who attended upon the second occasion, and were desirous of purchasing, were directed to retire to another room, where each was to write two different sums on a piece of paper; and, whoever should be found, on giving in those pieces of paper, to have written the

5. By the General Turnpike Act, the trustees were empowered to let the tolls by auction; but, to prevent undue preference, a minute-glass was to be turned thrice after each bidding; and if no other person bid, the last bidder to be the farmer or renter. Trustees under this act put up tolls subject to other conditions, one of which was, that, unless there should be three biddings, there should be no letting, unless the trustees thought proper to take less than three biddings, and that they should have a reserved bidding. The plaintiff made the only bid; whereupon the trustees declared, that, if there was no advance, they should be obliged to make a reserved bidding. The minute-glass was turned thrice, and there was no further bidding. The plaintiff filed his bill for specific performance, but the bill was dismissed, without costs.¹

6. A testator directed by his will, that his land should be sold at auction. It was accordingly advertised for sale, and A. offered by letter a certain sum, and no other person bid as much, and the land was afterwards conveyed to A. Held, a sale at auction.²

7. Upon the point, at what particular time a sale by auction is completed; it is held, that a bidder at an auction under the usual conditions, that the highest bidder shall be the purchaser, may retract his bidding any time before the hammer is down.³ But where one bids, at auction, though for another, but does not, at the time the lot is knocked down to him, *nor on the day of sale*, disclose to the owner, nor to the auctioneer, the name of his principal, he is responsible as the purchaser.⁴

¹ Levy v. Pendergrass, 2 Beav. 415.

³ Payne v. Cave, 3 Term Rep. 148.

² Tyree v. Williams, 3 Bibb, 368.
See Minturn v. Allen, 3 Sandf. 50.

⁴ McComb v. Wright, 4 Johns. Ch. 659.

largest sum, was to be declared the purchaser. This was held to be a mode of sale at auction, within the 19 Geo. III. ch. 36, sect. 3 & 4; and it was held, that the person who had so conducted the sale had incurred the penalty of £100 thereby imposed, for having acted as an auctioneer, without first taking out a license. Attorney-General v. Taylor, 13 Price, 636. (p. 73, n.)

8. Where several lots are knocked down to a bidder, and his name marked against them in the catalogue, a distinct contract, both in law and fact, arises for each lot; and a memorandum signed afterwards by him, stating that he agrees to become the purchaser of the several lots set against his name, does not require a stamp, though the aggregate exceed £20 in value, no single lot being of that price.¹ In such case, in a special action for refusing to adhere to the conditions of sale, the plaintiff cannot consolidate the contracts.²

9. An auctioneer sold, by request of the owner, different lots of standing wood, part of them lying out of his county. The purchasers took the wood, and paid the owners therefor, and the auctioneer afterwards paid the duty on the whole sales. Held, he might recover the amount of such duty from the owner, in an action for money paid.³

10. Estates may be *let* or *leased*, as well as sold, by auction. This is sometimes done by order of Court. Upon a letting under the Court, the person declared highest bidder will not be discharged from his bidding, though it was at a great overvalue, and was by an agent, who appeared to have misapprehended the intention of his instructions. But the lands may be set up again, upon the bidder's undertaking to pay all costs occasioned by a reletting, and to recognize for payment, yearly, during the term, of a sum to be settled by the master, by way of compensation for the loss of rent by letting. Where the bidding was £261 per annum, and was excessive, the Court ordered, upon consent, that the bidder be deemed tenant at £200, and take out leases at that rent, &c.⁴

11. St. 1822, ch. 87, (Massachusetts,) imposing a duty on sales by auction, does not embrace a lease thus made. Such statutes, imposing restrictions, or levying an excise or tax upon common occupations, are to be construed strictly.

¹ *Roots v. Lord Dormer*, 4 Barn. & Adol. 77; *Emmerson v. Heelis*, 2 Taunt. 38.

² *James v. Shore*, 1 Stark. Ca. 426.

³ *Robinson v. Green*, 3 Met. 159.

⁴ *Coote v. Coote*, 2 Ir. Eq. R. 159.

Here there is nothing sold by auction ; the estate not existing, which it was the object of the sale to fix a price for.¹

12. We shall hereafter have occasion to inquire, how a sale or purchase of land is rendered void. There is, however, one reason for avoiding sales at auction not applicable to others, and which may therefore be properly considered in this connection. I refer to the use of means on the part of the vendor or the purchaser, unknown at the time to the other party, to raise or reduce the price of the property sold. Upon this subject, numerous cases are found in the books. (a)

¹ Sewall v. Jones, 9 Pick. 412.

(a) The leading case, perhaps, upon this subject, is *Bexwell v. Christie*, Cowp. 395, where the owner of a horse, to be sold at auction, having directed the auctioneer not to sell it under a certain sum ; it was held, that no action would lie against the auctioneer for violating this direction, because it would be illegal to obey it ; otherwise, if the direction was, not to *put up* the horse under a certain sum. In this case, Lord Mansfield remarked, upon the practice of employing bidders for the owner, that the frequency of such practice was no argument in its favor, for the same might be said of gaming, stock-jobbing, and swindling. In another case,—*Howard v. Castle*, 6 T. R. 642,—Lord Kenyon uses the strong language : “ The whole transaction is bottomed in fraud—it is fraud from beginning to end. The whole of Lord Mansfield’s reasoning is founded on the noblest principles of morality and justice, and calculated to preserve honesty between man and man.” He further remarks, that, if this had been the first case, perhaps he should have hesitated, but “ Lord Mansfield’s comprehensive mind saw it in its true colors.”

On the other hand, in the case of *Twining v. Morrice*, 2 Bro. 331, Kenyon, M. R., says : “ I do not say the doctrine in *Bexwell v. Christie* is wrong ; but everybody knows that such persons are constantly employed.” So, in *Conolly v. Parsons*, 3 Ves. 625, n., the Lord Chancellor remarked, that *Bexwell v. Christie* turned upon the fact that there was no real bidder, and the purchaser refused instantly to complete the contract. It was a *trap-auction*. “ The reasoning goes large, and does not convince one. It would reduce every thing to a *Dutch auction*, a bidding downwards.” The rule has also been questioned by Sir Wm. Grant and Lord Roslyn.

The plaintiff and B. were appointed by the will of C., trustees to sell his lands. They were accordingly sold at auction, after public notice. D., the

13. It may be stated, as the general rule, that if the owner, or one of the owners, or his agent, of an estate put up at auction, employ *puffers*, or *by-bidders*, to bid for him, without declaring it; this is a fraud on the real bidders, and the highest bidder cannot be compelled to complete the contract, or may maintain a bill in equity to set it aside.¹ So, the employment of a puffer vitiates the sale, even though the property brought no more than its general value.² But not unless the buyer was thereby induced to bid more than the value of the property, or more than he had previously determined to bid.³

14. The rule more especially applies, where all the bidders, except the purchaser, are by-bidders, secretly employed by the seller, and the judgment of the purchaser is improperly influenced by their bids.⁴

15. It is not fraudulent for a puffer to bid *by degrees*, instead of making his highest bid at once.⁵ So, when there are real as well as sham bidders, and the last bid before the purchaser's is a real one, and the judgment of the real bidders and the purchaser has not been blinded by the sham bidders, the sale is valid.⁶ (a) Thus, at an auction sale, a

¹ Howard v. Castle, 6 Term Rep. 642; Crowden v. Austin, 3 Bing. 368; Towle v. Leavitt, 3 Fost. 360; Twining v. Morrice, 2 Bro. C. 326. See Smith v. Clarke, 12 Ves. 476; Bowles v. Round, 5 Ves. 508; Fairfax v. Muse, 4 Munf. 124; Hazal v. Dunham, 1 Hall, 146; Millar v. Campbell, 3 Marsh. 526; Donaldson v. McRoy, 1 Browne, 346.

² Staines v. Shore, 16 Penn. 200.

³ Tomlinson v. Savage, 6 Ired. Eq. 430.

⁴ Veazie v. Williams, 3 Story, 611.

⁵ Flint v. Woodin, 13 Eng. Law & Eq. 278. See Icely v. Grew, 6 C. & P. 671.

⁶ Veazie v. Williams, 3 Story R. 611.

plaintiff's counsel, bid £1,750, and the defendant £1,751. D. was a by-bidder of the trustees, who declared he did not want the land, and advised the defendant to purchase it. Held, if the defendant had no notice of D.'s being thus employed, and if D. bid in order to enhance the price for the benefit of the trustees, the sale was void. *Monerieff v. Goldsborough*, 4 Har. & M'H. 281.

(a) Where two parties enter into a wager as to the price of opium at a certain sale, each knowing that the other would use means to influence the

person bid for the vendor £75 per acre, upon private notice to the auctioneer. After a contest with *bonâ fide* bidders, the property was sold for over £101, and some days afterwards the vendee paid the duty. Held, the sale was binding.¹ But the sale is void, although only one by-bidder be employed, and although he is only to bid up to a certain sum, unless it is announced at the time.²

16. Notice may be given, that the property will be put up at a certain price, or that the owner reserves to himself one bid.³ And, in case of the sale of property of an infant, there should be a reserved bidding.⁴ (a)

¹ Bramley v. Alt, 3 Ves. 620.

³ Towle v. Leavitt, 3 Fost. 360.

² Wheeler v. Collier, 1 Moo. & M. 123.

⁴ Cutts v. Salmon, 12 Eng. Law & Eq. 316.

price, it is no fraud on one, that the other thus raises the price. Doolubdass v. Ramloll, 3 Eng. Law & Eq. 39.

So, employing agents to bid for such a purpose is not an unlawful conspiracy. Ibid.

So, if one has a right to purchase a certain quantity of opium at a sale, no fraud on the vendors is committed by bribing the agent of A. to exercise that right. Ibid.

It has been held, in South Carolina, that the employment of a bidder for the vendor is not illegal, though no notice be given, and the price be thereby very much enhanced. Thus, at a sale of land, there were *bonâ fide* bidders up to \$18 or \$20 per acre, after which the bidding was confined to the puffer and the defendant, who purchased at \$44. The latter was a good judge of the land, lived in the neighborhood, and was acquainted with the premises, while the by-bidder enjoyed none of these advantages. The latter also communicated openly with the owner. The property was an old family seat, which was sold with reluctance, and merely for the purpose of effecting a division, and for which therefore the owner was justified in securing a large price. Specific performance was decreed against the defendant. Jenkins v. Hogg, 2 Const. S. C. 821.

(a) An agreement, by an administrator or guardian, to offer the real estate of his intestate or ward for sale by auction, and to sell the same to a particular individual, for an agreed price, provided no higher sum should be bid, is valid. But such an agreement to sell the estate at a fixed price, without regard to the biddings, is fraudulent and void. Hunt v. Frost, 4 Cush. 54.

17. The rule applies to a *sheriff's sale*.¹ Thus, the employment of a puffer at a sale of property seized under an extent, by an agent of the Crown, to whom a bidding is reserved by the conditions of sale, vitiates the sale.²

18. The circumstance, that a person bid under the private direction of the vendors, for the purpose of preventing a sale under a sum specified as the value, is no objection to a specific performance, especially where the vendors were assignees in bankruptcy, and the purchaser was not present, but purchased by an agent.³

19. The misconduct of the purchaser does not preclude him from objecting to the employment of a puffer.⁴ But it is the duty of the purchaser to return the property as soon as the fraud is discovered, unless it is too late to do so.⁵ So, in case of by-bidding, the purchaser, immediately upon the discovery of it, must elect to rescind or abide by the purchase. Thus, where land was sold as containing a gold-mine, and a by-bidder employed by the sellers to enhance the price, and the purchasers brought a bill to rescind, twelve months or more after notice of this fact, in the mean time having continued to work and explore the land; held, they were barred by lapse of time.⁶

20. Certain mill privileges of the defendants were sold at auction by H., as their agent, to the plaintiff. After five years, when the property had greatly deteriorated, the plaintiff brings a bill in equity, charging that H. had, by sham bids, fraudulently enhanced the price, far beyond the real value of the property; but not charging the defendants with knowledge and connivance with him, at the time of the sale. Held, as the false bidding by the auctioneer was unauthorized by the seller, it would not avoid the sale, although it would be good ground of action against the auctioneer for damages; that H. ought to have been made a party to the

¹ Donaldson v. McRoy, 1 Browne, 346.

² Rex v. Marsh, 3 Y. & Jerv. 331.

³ Smith v. Clarke, 12 Ves. 476.

⁴ Rex v. Marsh, 3 Y. & Jerv. 331.

⁵ Staines v. Shore, 16 Penn. 200.

⁶ McDowell v. Simms, 1 Bush. Eq. (N. C.) 130.

bill, and that the lapse of time was, under the circumstances, a bar to the suit.¹ (a)

21. An agent for the complainants, in a foreclosure suit, may bid for his principals in his own name, without giving notice of it to other bidders.² (b) So, at a sale by order of the Court, a reserved bidding was allowed to be made one of the conditions, the master to fix the amount, and to use his discretion in communicating it to the parties, or their solicitors.³

22. It has been held, that the sale cannot be objected to on this ground (puffing) in a suit for the price against the purchaser, but only by an action on the case or bill in equity.⁴

23. By-bidding may avoid a sale as to part only of the property sold. Thus, at a sale by auction under the decree of the Orphans' Court, A., one of the parties interested, bid, to raise the price, on one tract, and B., the agent of C., another party interested, bid for C., whose purchase would not have been void but voidable, upon another. Held, the sale of the former tract was void, but that of the latter was valid.⁵

24. While the rule above stated has been adopted for the protection of *purchasers*, another, and the converse of the

¹ *Veazie v. Williams*, 3 Story's Rep. 611; *Tomlinson v. Savage*, 6 Ired. Eq. 430. ³ *Jervoise v. Clarke*, Jac. & Walk. 389.

² *National Fire Insurance Co. v. Loomis*, 11 Paige, 431. ⁴ *Millar v. Campbell*, 3 Marsh. 526, (*sed quere.*) ⁵ *Pennock's Appeal*, 14 Penn. 446.

(a) A release of all liability in the premises having been executed by the plaintiff to the auctioneer, held, a release of his principals the defendants.

(b) If he does this, without disclosing it to the master, he is personally responsible. The principle, upon which the employment of puffers is disallowed, is, that they are not *real bidders*, but the instruments of the vendor, to deceive the other bidders. But the principle is not applicable to a master's sale of property, under a decree, where the complainant is authorized to bid upon the property, at the sale, and is bound to take it if bid off, by him, or by his agent duly authorized.

former, is applied for the benefit of *vendors*. Auction sales, (particularly those made by a sheriff) are said to be founded upon the idea of fair competition. And as the employment of puffers is *a fraud upon the vendee*, so an association of bidders, designed and calculated to stifle competition, chill the sale, and depress the price below the fair market value, it being agreed that one shall buy for the benefit of all, is *a fraud upon the vendor*, as well as *a fraud upon the law* and against public policy, and avoids the sale even at law, so that a deed executed in consequence of it conveys no title.¹ (a)

25. So, a sale of mortgaged land by Commissioners in Chancery ought to be set aside, and another decreed, upon its appearing to the Court that the highest bidder had previously agreed with a purchaser from the mortgagor, that he would allow such purchaser to redeem the land within a limited time, by repaying him his money with interest; and that such agreement being known at the sale, other persons were induced to refrain from bidding, and, consequently, the land was struck off at a price inferior to its value.²

26. So, an agreement by the owner of an execution, on which lands to an amount in value far exceeding the debt had been seized, to prevent the usual competition at the sheriff's sale, and in order to leave a balance due on the execution, for the purpose of having lands of the debtor, in other counties, seized and sold, is fraudulent; and the execution is deemed, in law, satisfied.³ So, A., being indebted to B., mortgaged to him certain property, which was levied on by C. under an execution. Before the sale, A. agreed by parol with C., that C. should bid in the property at the amount of

¹ Smith v. Greenlee, 2 Devereux, 126; Martin v. Raulett, 5 Rich. 541; Piatt v. Oliver, 1 McL. 295; Phippen v. Stickney, 3 Met. 384; Switzer v. Skiles, 3 Gilm. 529.

² Wood's Executor v. Hudson, 5 Munf. 423.

³ Troup v. Wood, 4 Johns. Ch. 228. See *Hamburgh v. Edsall*, 1 Halst. Ch. 249, 658.

(a) It has even been held an indictable conspiracy. *Levi v. Levi*, 6 Car. & P. 239.

the execution, and give A. time to redeem it for the benefit of B. Other persons, friends of A., who were also present at the sale, did not bid, relying on this agreement. Held, on a bill in equity to enforce the agreement, that it was not within the Statute of Frauds, so as to prevent its execution by a Court of Equity; but, whether it was valid or not, that this sale could not be ratified, as there were parties present, who were kept from bidding by their knowledge of the agreement.¹

27. A plantation, worth at least \$40,000, was ordered by the Court of Chancery to be sold, to satisfy, in their order, four mortgages, given to secure debts amounting to \$80,000. The first mortgage was owned by B., and secured a debt of \$22,000, and the last was owned by N., his debt being \$17,000. B. also had an unsecured debt against the mortgagor of \$16,000. N. had determined, if necessary to secure his debt, to bid the property up to \$50,000, and this coming to the knowledge of B., he proposed that if N. would not bid against him, and if he should purchase the plantation at or under \$30,000, he would secure N.'s debt—the agreement to be at an end, if the biddings went over \$30,000. This was acceded to, and at the sale B. bid off the property at \$11,000. B. had entered into an arrangement before the sale, if he became purchaser, to sell the property, on credit, for \$55,000, a sum sufficient to secure his own mortgage, N.'s mortgage, and B.'s unsecured debt. Held, on the application of the intermediate mortgagees, that the agreement between B. and N. was illegal, and the sale was set aside.²

28. A. and B., sureties of C., whose property was about to be sold at sheriff's sale, for the purpose of indemnifying the sureties, agreed not to bid against each other; that B. should bid, and that, if the property was knocked off to him, the sureties of C. should share in the benefit of a resale. A.

¹ *Rose v. Bates*, 12 Mis. 30.

² *Hamilton v. Hamilton*, Rich. Eq. 355.

intended to bid at the sale, and, but for the agreement, would have done so. On the day of sale, B. met a judgment creditor of C., who attended "for the purpose of looking after his case," and, telling him he need not bother himself, offered to buy, and did buy, his judgment. At the sale, B. purchased property to a considerable amount, and at a considerable sacrifice. Held, on a bill filed by the creditors of C., that the conduct of B., in silencing bidders, was illegal, and the sale was set aside.¹

29. When mortgaged property has been described in the advertisement of the sheriff as subject to a larger ground rent than it really is, and thereby sold at an under-price; the sale will be set aside, though before it occurred the mistake was corrected.²

30. There are cases, however, which somewhat qualify the general principle above stated. Thus, it is said, that a sale is not invalid, when an association of bidders has for its object a fair competition, and is formed because one, from the magnitude of the purchase or the like, cannot bid on his own account. So, if the purpose be, to enable each of the parties to become a purchaser, when he desires a part of the property only, or any other honest and reasonable purpose.³ So, it has been held, that sales on execution are distinguishable in this respect from voluntary sales, and especially sales of public lands, made at public auction by the United States; and, it is said, that an association of individuals cannot purchase at such sales, is a *novel doctrine*. So it has been held, that lien creditors, as well as others, may purchase jointly, even at sheriff's sales, if all be open and fair. A combination of interests for that purpose is not necessarily corrupt. It is the end to be accomplished, which makes such a combination lawful or otherwise; if it be to depress the price of the property by artifice, the purchase will be void; if it be to raise

¹ *Hamilton v. Hamilton*, Rich. Eq. 355. *Welch v. Murray*, Ib. 196; *Denn v. Leeony*, Cox, 39.

² *Wells v. Pfeiffer*, 4 Yea. 203. See ³ *Smith v. Greenlee*, 2 Dev. 126; *Kearney v. Taylor*, 15 How. 494.

the means of payment by contribution, or to divide the property for the accommodation of the purchasers, it will be valid.¹ So, an agreement between A. and B., that B. will permit A. to buy a tract of land which is to be sold at auction, and that A. will buy it, and convey a certain part thereof to B. at an appraisement to be made by persons named in the agreement, is not, on the face of it, void for illegality.² So, a mere unsuccessful attempt of the purchaser to prevent a person from bidding will not avoid the purchase.³

31. The general rule, above considered, applies as well between the parties themselves who enter into the illegal agreement, as in reference to the vendor. Thus, the contract or job for making a road was put up at auction, and A. and B. agreed that one of them should bid, and, if the contract should be struck off to him, the other should have an equal share in it. B. having become the purchaser, A. brought an action against him on the agreement. Held, the agreement was without consideration, and void.⁴

32. But a party not prejudiced cannot avoid an auction sale, on account of proceedings on the part of others concerned, which may tend to reduce the price. Thus, if the trustee, or one of the creditors, in a deed for the benefit of creditors, be authorized to prescribe the day of sale, and the length of time for which it shall be advertised; the failure to notify any of the creditors of the time and place, does not warrant the inference, that as to one of the creditors provided for, and who attended the sale and purchased the property, the sale was fraudulent; and the grantor, who assented to, and was present at the sale, cannot, upon that ground, defeat an action by the purchaser for the recovery of the articles sold. And where the sale of property, which had been conveyed by deed of trust, was, under the powers conferred, expedited, (with the assent of the grantor,) so as to prevent the inter-

¹ *Small v. Jones, W. & Serg.* 128.

² *Phippen v. Stickney*, 3 Met. 384.

³ *Haynes v. Crutchfield*, 7 Ala. 189.

⁴ *Wilbur v. How*, 8 Johns. 444.

ference of some of his creditors, who were prosecuting their claims to judgment; the grantor, when sued by the purchaser at the trust sale for property sold, cannot for that cause defeat a recovery.¹

33. If a purchaser at sheriff's sale participate in a fraudulent contrivance, by which he was enabled to become the purchaser, in an action of ejectment against him for the property, it is not necessary that the plaintiff should offer to refund the amount bid and paid.²

34. It is not *per se* fraudulent for the owner to act as auctioneer.³ But it has been suggested, that an auction sale to an association, of which the auctioneer is a member, is invalid.⁴ And it has been expressly decided, that an auctioneer cannot purchase property himself. So, if he has also been in other respects connected with the vendor, as by valuing the property; and purchases the estate the next day by private contract, it not being sold at auction, for want of a bid; and fails to give a satisfactory account of the proceedings in his answer to a bill filed against him; the purchase will be set aside. In such case, the duties of an agent do not cease with the auction.⁵

35. But a purchase by an auctioneer for himself is not void, but voidable by the principal. Third persons cannot question the sale.⁶

36. As in the case of other agents, (see Chap. V.,) an auctioneer's authority to sell land need not appear in writing.⁷

37. An auctioneer cannot delegate his authority.⁸ But he may employ another person to use the hammer and make the outcry, under his immediate supervision and direction; and, though he is occasionally absent during the sale, the agent will not incur the penalty of selling without license.⁹ Whether the transaction was a sale by the auctioneer, made

¹ Haynes v. Crutchfield, 7 Ala. 189.

² Small v. Jones, W. & Serg. 128.

³ Flint v. Woodin, 13 Eng. Law & Eq. 278.

⁴ Kearney v. Taylor, 15 How. 494.

⁵ Oliver v. Court, 8 Price, 127.

⁶ Veazie v. Williams, 3 Story, 611.

⁷ Doty v. Wilder, 15 Ill. 407.

⁸ Stone v. The State, 12 Mis. 400.

⁹ Com. v. Harnden, 19 Pick. 482.

through the defendant, or by the defendant, under pretence of a permission from the auctioneer, in order to evade the statute, is a question for the jury.¹

38. Questions sometimes arise, as to the authority of the auctioneer to receive payment for the property sold.

39. An auctioneer's authority, to receive a portion of the purchase-money, which, by the terms of sale, is to be paid within a certain time, does not, *ipso facto*, expire immediately at the end of that time.²

40. Under some circumstances, payment to the auctioneer will be invalid.

41. Thus, the plaintiff having employed an auctioneer to sell timber growing, the following, amongst other conditions, were read at the sale, in presence of the defendant: "That each purchaser should pay down a deposit of £10 per cent. in part of the purchase-money, and pay the remainder on or before the 17th of August; but in case any purchaser should prefer to pay the whole amount of his purchase-money at an earlier period, discount after the rate of £5 per cent. will be allowed." Also, "that each purchaser shall enter into a proper agreement and bond, if required, with such one, two, or more sureties as shall be approved by the vendor, or his agent, for the performance of his agreement, pursuant to the above conditions." The defendant purchased one lot, and paid the deposit. Some days after the sale, which was on the 14th of February, the defendant, at the auctioneer's request, drew a bill of exchange for the residue of the purchase money, dated on the day of the sale, and payable in six months to his own order, and indorsed it to the auctioneer, who indorsed it to a creditor of his own. When the bill became due, it was paid, but never transferred to the plaintiff. Held, the delivery and payment of the bill was not a valid payment of the purchase-money, the auctioneer having no authority to receive payment, or, if he had such authority, only in cash.³

¹ Com. v. Harnden, 19 Pick. 482.

³ Sykes v. Giles, 5 M. & W. 645.

² Pinckney v. Hagadorn, 1 Duer, 89.

42. The auctioneer is, in general, responsible for the purchase money paid him, only to his employer. Thus, the defendant, an auctioneer, was employed by a person in embarrassed circumstances, known to the defendant, to sell his property; sold it, and paid the proceeds to his order. The owner was soon afterwards declared insolvent. Held, the defendant was not liable to the assignees.¹

43. It has been questioned, whether sales by auction, except those made under a decree, are within the *Statute of Frauds*.² But the weight of authority is that they are.³ Thus, where a contract for the sale of land has been abandoned, and an action brought for the deposit, and the plaintiff declares on the special circumstances, and states the contract, he must prove it to have been a valid one, by a note in writing, even though the sale was by auction.⁴ (a)

44. But if auction sales are within the statute, the weight of authority also is, that an auctioneer is by implication *an agent*, duly authorized to sign a contract for the purchase of a real estate, on behalf of the highest bidder. Writing the name of the highest bidder in his book, or memorandum of sale, is a sufficient signature, more especially if done immediately on receiving the bid and knocking down the hammer. And, if the highest bidder is agent for another, and if the terms and conditions are stated, the writing of the bidder's name will bind the principal; at least if the principal is present, and consulting with the agent during the sale, and makes no objection before the entry made in the book.⁵

¹ *White v. Bartlett*, 9 Bing. 378.

² *Simon v. Motivos*, 1 Bl. 599; *Brook v. Jones*, 8 Tex. 78.

³ *Blagden v. Bradbear*, 12 Ves. 466; *Higginson v. Clowes*, 15 Ves. 516.

⁴ *Walker v. Constable*, 2 Esp. Ca. 659.

⁵ *White v. Proctor*, 4 Taunt. 209;

M'Comb v. Wright, 4 Johns. Ch. 659;

Pinckney v. Hagadorn, 1 Duer, 89;

Doty v. Wilder, 15 Ill. 407; *Hunt v.*

Gregg, 8 Blackf. 105; *Meadows v.*

Meadows, 3 M'C. 458. See *Bartlett v.*

Purnell, 4 Ad. & Ell. 792; *Howe v.*

Dewing, 2 Gray, 476.

(a) A *sheriff's* sale is within the statute, but his return, stating fully the terms of the contract, if made immediately upon the sale, is a sufficient signing. If otherwise, not. *Jackson v. Catlin*, 2 Johns. 248; *Hunt v. Gregg*, 8 Blackf. 105.

The auctioneer's authority is given by the buyer's *bidding aloud*, or giving in his name.¹ And specific performance will be decreed against the purchaser, upon the note made by the auctioneer.²

45. On the other hand, it has been held, that the auctioneer is not an agent for both parties, and therefore such entry in his book is not a sufficient note in writing.³ (a) More especially that fact not being proved to be contemporary, and the auctioneer being also vendor.⁴ So, a plea, that "A., by his writing, sold the after-math of land to B.," is not proved by evidence, that, at an auction held for the purpose of selling it, B. was the purchaser, and gave his note for the price, and that his name was written by A.'s agent in the printed catalogue, as the buyer.⁵ So, the rule above stated extends only to persons exercising the public business of an auctioneer, not to mere private agents of the vendor.⁶

46. The mere signing of the auctioneer is not sufficient,

¹ *Emmerson v. Heelis*, 2 Taunt. 38; *Simon v. Motivos*, 1 Black. 599. In this case, Lord Mansfield remarked, that the solemnity of an auction sale precludes all perjury as to the fact of the sale; and expressed it as the inclination of his opinion, that auctions, in general, are not within the Statute of Frauds. *Wilmot, J.*, was inclined to think, that sales by auction, openly transacted before five hundred people, were not within the statute. But in *Hinde v. Whitehouse* (7 E. 568,) Lord Ellenborough remarked, that, with all due deference, it was no sufficient reason to dispense with the statute, merely that the *quantum* of parol evidence diminishes the danger of perjury; but failed to express a decided opinion upon either side of the question. The plaintiff, an auctioneer, brings special assumpsit against the

highest bidder at a sale of land, to recover money paid by the plaintiff for the auction duty; which, by the conditions, the purchaser was to pay. It appeared that the sale was invalid, in consequence of the plaintiff's having omitted to set down the name of the defendant. Held, neither this action, nor an action for money paid, would lie. *Jones v. Nanney*, 13 Price, 76. See *Deven v. Davenell*, 3 Camp. 451.

² *Kemeys v. Proctor*, 3 Ves. & B. 57; 1 Jac. & Walk. 350.

³ *Stansfield v. Johnson*, 1 Esp. Ca. 101; *Buckmaster v. Harrop*, 13 Ves. 456. See *Simon v. Motivos*, 1 Black. 599.

⁴ *Buckmaster v. Harrop*, 13 Ves. 456.

⁵ *Symonds v. Ball*, 8 Term Rep. 151.

⁶ *Anderson v. Chick*, 1 Bai. Eq. 118.

(a) By the Revised Statutes of New York, a contract of sale is void, and not binding upon the vendor or vendee, unless subscribed by the vendor or his agent thereto duly authorized; and the entry by the auctioneer on his books is not a signing within the statute. *Miller v. Pelletier*, 4 Edw. Ch. 102.

unless the terms and conditions of the sale appear in the paper signed. His memorandum, or some writing connected therewith, must refer to the conditions of sale, and state the material terms of the agreement.¹ Thus, an auctioneer, after reading or exhibiting written conditions, made this memorandum: "Sale, on account of Messrs. Morton and Dean, assignees of the Taunton Iron Company, of the real estate, nail-works, water-privilege, buildings, and machinery, agreeable to the plans and schedule herewith. Sale to Silas Dean for \$30,300. April 5th, 1843." Held, this memorandum was insufficient, not containing nor referring to the conditions of sale.² So, an auctioneer's receipt for the deposit, not containing expressly or by reference the terms, viz: the price, cannot bind the vendor as an agreement.³ So where, on the sale of an estate by auction, the name of the owner does not appear in the particulars or conditions of sale, or in the agreement signed by the purchaser, and the agreement is not signed either by the vendor or the auctioneer, it seems the seller cannot maintain an action on the contract.⁴

47. The *agent*, contemplated by the 17th section of the statute, who is to bind a defendant by his signature, must be a *third person*, and not the other contracting party. Therefore, where an auctioneer wrote the defendant's name, by his authority, opposite to the lot purchased; held, in an action brought in the name of the auctioneer, the entry was not sufficient.⁵ So, where an administrator, licensed to sell the real estate, acted as auctioneer; held, a memorandum by him of the sale at the time was not binding on the purchaser, the auctioneer not being in law his *agent*.⁶

48. It has been held, that the highest bidder is bound by the entry in the sale-book by the auctioneer's *clerk*, made in his presence, upon his name being called out as the pur-

¹ Morton v. Dean, 13 Met. 385; Doty v. Wilder, 15 Ill. 407.

² Ibid.

³ Blagden v. Bradbear, 12 Ves. 466.

⁴ Wheeler v. Collier, 1 M. & M. 123.

⁵ Farebrother v. Simmons, 5 Barn. & Ald. 333.

⁶ Smith v. Arnold, 5 Mas. 414.

chaser, even in an action brought by the auctioneer.¹ If an auctioneer has a clerk, to make entries in the sale-book; authority of the purchaser, to enter his name in such book, must necessarily be implied, where, within view of all the bidders, he is employed to thus enter the names; and such authority may be given before or at the time of entry, and a subsequent assent of the purchaser will confirm an entry made without authority.² So, an auctioneer's clerk, under a general authority to act in his master's absence, may sign a contract for sale, where the vendor knew that he was so to act. So, where such clerk signs the contract as a witness for his master, who is authorized to sell, he may be considered as a contracting party according to the statute.³

49. But, in the following case, lands of the defendant were put up by him at auction, and one condition of the sale was, that the purchaser should pay a deposit and half the auction-duty. The plaintiff purchased and paid as above, and signed a written memorandum of the contract, which A. B., the auctioneer's clerk, also signed, as follows: "Witness, A. B." A. B. received the above sums for C., the auctioneer, and signed the receipt (being authorized by C. to do so,) as follows: "For Mr. C., A. B." Money was afterwards paid over by the auctioneer on the purchase, to D., the defendant's attorney, as his agent. The defendant not being able to make out his title, D., as his agent, wrote a letter to the plaintiff's attorney, naming the plaintiff and defendant, saying that he could not make out the title to "this property as freehold," advising the plaintiff to relinquish his purchase, and referring to the "charges" to be made by the plaintiff's attorney. Held, that A. B. did not sign the memorandum as agent to the defendant; that neither his agency nor the contract was recognized by the receipt of the money or D.'s

¹ *Bird v. Boulter*, 1 Nev. & Man. 313; 4 Barn. & Adol. 447; *Doty v. Wilder*, 15 Ill. 407. But see *Meadows v. Meadows*, 3 M'C. 458.

² *Cathcart v. Keirnaghan*, 5 Strobb. 129.

³ 1 Smith's Rep. 233.

letter; that there was, consequently, no proof of a contract to make a title, on which the defendant could be charged under section 4 of the Statute of Frauds; and therefore, that although the plaintiff might recover the deposit and moiety of auction-duty as money had and received, he could not recover interest thereon, nor his expenses of investigating the title.¹

50. Questions have arisen as to the introduction of *parol evidence* in relation to auction sales of land, &c. Upon this subject, it is held, that the verbal declarations of an auctioneer, at the time of sale, are not admissible, to contradict the printed conditions or particulars.² So, though the question arises on a sub-sale by the purchaser.³ So, though a paper, as the particular upon a sale by auction, may by reference be engrafted into a contract within the Statute of Frauds, that will not authorize the introduction of *parol evidence* to show what part was read.⁴ So, *parol evidence* is not competent, in aid of a specific performance, to explain by declarations of the auctioneer an ambiguity on the face of the particular, growing out of a general clause for a separate valuation of the timber, and also special provisions as to the timber upon certain lots; the agreement, signed on the back of the particular, binding the purchaser, the defendant, "to a strict fulfilment of the article, and to abide by the conditions and regulations made at the sale."⁵ So, in an action against a purchaser at auction, for not completing the sale, the printed conditions cannot be contradicted by the verbal declarations of the auctioneer at the time, in order to disprove the charge of misrepresentation. Thus, where the conditions were, that the property was "free from all incumbrances," when, in fact, there was a charge upon it of £17 per annum, which the auctioneer declared, but not to the purchaser individually; held, no action would lie against the

¹ Gosbell v. Archer, 2 Ad. & Ell. 500.

⁴ Higginson v. Clowes, 15 Ves. 515.

² Gunnis v. Erhart, 1 H. Bl. 289.

⁵ Ibid.

³ Shelton v. Livins, 2 Crompt. & Jerv.

latter for not completing his purchase.¹ So, where printed conditions of sale of timber, growing in a certain close, do not state the quantity, parol evidence is not admissible that the auctioneer warranted a certain quantity.²

51. But parol evidence of declarations by the auctioneer at the sale, warranting the quantity, were received in opposition to a specific performance, on the ground of fraud; not to enforce the performance.³ (a) So, though parol evidence

¹ *Gunnis v. Erhart*, 1 H. Bl. 289.

³ *Winch v. Winchester*, 1 Ves. &

² *Powell v. Edmunds*, 12 East, 6.

Beam. 375.

(a) Assumpsit, upon a promise by the defendant to pay one A. the amount of a debt due from the plaintiff to A., secured by a mortgage of the plaintiff's real estate, in consideration of a deed of release given by the plaintiff to the defendant of such estate. It appeared, that the plaintiff had an auction sale of his property, including the estate in question. When this was offered for sale, the auctioneer, after describing the property, stated the precise amount of the mortgage, and called for bids by asking, "Who will give more?" or, "How much more will you give?" and it was struck off to B. for \$50. The defendant, being present at the sale, afterwards agreed with B. to buy his bid for \$25 advance. The plaintiff thereupon gave a quitclaim deed to the defendant, with a covenant against the claims of all persons claiming by, from, or under him, except the mortgage, and the defendant paid to B. the sum agreed. Held, parol evidence was admissible, of an understanding by the plaintiff and B. at the sale, that the purchaser was to pay the mortgage debt, notwithstanding the memorandum of the auctioneer's clerk and the deed of the plaintiff; and that the agreement was not within the Statute of Frauds. *Fiske v. M'Gregory*, Law Rep. Mar. 1857, p. 633, (New Hampshire.)

Assumpsit for the price of land sold at auction. The bid was \$600, \$200 to be paid down, which was done; the balance to be secured on time, and the deed executed upon production of the requisite securities. The plaintiffs made a proper deed, and tendered it on condition of receiving the securities. The defendant did not give them, but obtained the deed and placed it on record without consent of the plaintiff, and took possession of the land. Held, the defendant having treated the deed as delivered, the plaintiff might elect to do so, and thus vest the title in the defendant, notwithstanding the Statute of Frauds. Also, that a special action could be maintained against the defendant, for failing to furnish the securities, before the time fixed for payment, and damages recovered to the amount of the agreed price. Also, that a general action for the price might be brought, after the time of payment had passed. *Ascutney, &c. v. Ormsby*, Law Rep. Dec. 1, 1856, p. 469, (N. H.)

of the declarations of an auctioneer, contrary to the written terms of sale, is not admissible, such evidence, as to the property intended to be sold by him, is proper.¹ So, a purchaser at auction is bound by verbal declarations of the vendor, made publicly, at the sale, and before the biddings; which declarations are not variant from the terms advertised, but are additional and explanatory thereto. And he shall be compelled to complete his purchase according to the terms so explained.²

52. It has been questioned, whether the rule against admitting verbal declarations of an auctioneer at the time of sale, in contradiction to the printed particulars, has the effect to exclude evidence of personal information as to a mistake in the particular.³ So, the printed conditions of sale posted up under the auctioneer's box, he declaring that the conditions are as usual, are sufficient notice to purchasers of such conditions.⁴ So, the auctioneer's advertisement may be explained by his declarations at the time of sale.⁵

53. It will be seen hereafter, that *part-performance* of a verbal contract takes it out of the operation of the *Statute of Frauds*. (See ch. 8.) But it has been held, that payment of the auction-duty is not such a part-performance as will have this effect.⁶

54. In connection with the subject of *sales by auction*, may properly be considered the rights and liabilities of vendor and purchaser, with reference to a *deposit*. A deposit is the payment of a part—usually a small part—of the price, by the purchaser; made chiefly for the purpose of binding the bargain. Occurring for the most part in sales by auction, it naturally forms a part of that particular title in the law of vendors and purchasers.

55. An auctioneer receiving a deposit is said to be a *stake-*

¹ Lessee of Wright v. Deklyne, Peeters' Cir. C. 199. See Wainwright v. Read, 1 Desaus. 573.

² Cannon v. Mitchell, 2 Desaus. 320.

³ Ogilvie v. Foljambe, 3 Meri. 53.

⁴ Mesnard v. Aldridge, 3 Esp. Rep. 271.

⁵ Rankin v. Matthews, 7 Ired. 286.

⁶ Buckmaster v. Harrop, 7 Ves. 341.

holder, not the *agent* of the parties. He is held to be liable at all events, till the contract is completed. His knowledge of a defective title is equivalent to an express notice not to pay over. The deposit is a conditional payment, not to be parted with till the conditions are fulfilled.¹ (a) Hence, if the vendor of an estate by auction does not show a clear title by the day specified, the purchaser may recover back his deposit and rescind the contract.² So, where an auction purchaser rescinds the bargain, in consequence of an objection to the title and concealment of material facts, he may recover a deposit from the auctioneer, no proof being offered that it has been paid over to the vendor. The auctioneer would have no right to pay it over, till completion of the

¹ *Edwards v. Hodding*, 1 Marsh. 377;
Burrough v. Skinner, 5 Burr. 2639.

² *Wilde v. Foote*, 4 Taun. 334.

(a) Sale of houses at auction, according to certain particulars and conditions, one of which was, that an abstract of title be delivered within ten days, and another, that a deposit be paid the auctioneer. A purchaser of two houses paid the deposits, signed an agreement as purchaser, and took a receipt from the auctioneer, as for payment of a deposit upon the auction sale of the premises named in the particulars, &c. The abstract not being delivered, the vendee brings an action against the auctioneer for his deposit, and offers in evidence the receipt and conditions of sale, but not the agreement signed by himself. Held, the action was not sustained. *Curtis v. Greated*, 3 Nev. & M. 449; 1 Ad. & Ell. 167.

The title of an estate sold at auction being objected to, the auctioneer refused to return the deposit, and was compelled to pay the costs of a suit brought against him. Held, he could not recover the amount from the vendor, in an action for money paid, but must declare specially. *Spurrier v. Elderton*, 5 Esp. 1. See *Mitchell v. Hayne*, 2 Sim. & St. 63.

If an auctioneer deviate from the strict terms of the conditions, he must personally suffer the consequences; being liable for the duties, and not entitled to maintain any action against the vendee. If the auctioneer has fulfilled his duty, he may maintain *assumpsit*, as on an implied promise, against the vendor; who also has a claim upon the purchaser, on the express agreement arising from the conditions of sale. *Jones v. Nanney*, 13 Price, 76. As to the general rights and liabilities of an auctioneer, see *Rex v. Christie*, 2 Anst. 586; *Hardacre v. Stewart*, 5 Esp. 103; *Nelson v. Aldridge*, 2 Stark. 435; *Brown v. Stadton*, 2 Chit. 353.

sale.¹ So, an auctioneer received a deposit from the purchaser, in presence of the vendor, signed an agreement acknowledging the sale, and engaged to complete it; but, by reason of a defect in the title, the sale was not completed. Held, the purchaser might recover the deposit from the auctioneer, though paid over to the vendor before discovery of the defective title, and though the purchaser had given him no notice against paying it over.²

56. The net amount of a deposit only, without interest, can be recovered in an action for money had and received.³ So, where an auction purchaser paid to the auctioneer a deposit as part of the price, until the title should be made out; held, the auctioneer was not liable for interest, though four years had elapsed since the sale, no demand of payment having been made upon him.⁴ So, an auctioneer, as agent for the vendor, agreed to sell according to printed conditions, by which the purchaser was to pay down a deposit and the duty, and the balance of the price at a certain day, upon receiving a good title, and the vendor was to prepare and deliver to the vendee an abstract. The title being defective, and the sale consequently failing, held, the auctioneer was a stake-holder, and not liable for interest, unless the money had been demanded, or notice given him that the bargain was rescinded.⁵

57. All matters of difference between two parties were referred by a Judge's order to arbitration, and an agreement of reference entered into, in which one of them was described as the administrator of a deceased person, late owner of the leasehold premises, the right to which was in dispute. It was awarded, that the premises be sold by an auctioneer, whose appointment was assented to by both parties. The plaintiff, the attorney of one of the parties, who, at the time of the sale, was aware that the other had not taken out

¹ *Burrough v. Skinner*, 5 Burr. 2639.

² *Gray v. Gutteridge*, 3 C. & P. 40.

³ *Walker v. Constable*, 1 Bos. & Pul.

⁴ *Lee v. Munn*, 1 Moore, 481.

⁵ *Gaby v. Driver*, 2 You. & J. 549.

administration, became the purchaser, and paid a deposit to the auctioneer, it being understood, at the time of the sale, that administration would be taken out. The proposed administrator, however, afterwards refused to do so, and a good title was not made out. Held, the plaintiff might recover his deposit from the auctioneer, without notice of the contract having been rescinded.¹

58. A., as the agent of the defendant, the owner of land, enters into an agreement, with penalty, for the sale of it, with B., who appears to act on his own account, but in fact is the agent of the plaintiff, and B. pays part of the purchase-money as a deposit. Held, upon a breach of the conditions of sale, on the part of the vendor, an action for money had and received lies to recover back the deposit, without proof of the money being paid over by A. to the defendant.²

59. On a contract for purchase, a part of the purchase-money was paid as a deposit to the vendor's solicitor, who paid it away at the desire of the vendor, without the concurrence of the purchaser. This created a difficulty in completing the purchase, as a mortgagee of the estate would not join in the conveyance without payment to him of the deposit. In a suit by the purchaser for specific performance, the solicitors were declared liable to make good the money.³

60. An attorney, who was also an auctioneer, received a deposit on property, which he had sold by auction, and, after queries raised on the title, and before they were cleared, paid over the deposit to his principal. On a demand of the deposit by the buyer, he answered, that his principals would not consent to return, and would enforce the contract. Held, the buyer might recover the deposit from the auctioneer as money had and received to the plaintiff's use: 1, because the defendant, as attorney, had notice that the title had not been completed before he paid over the money; 2, because

¹ *Duncan v. Cafe*, 2 Mees. & Wels. 244.

² *The Duke of Norfolk v. Worthy*, 1 Campb. 337.

³ *Wiggins v. Lord*, 4 Beav. 30.

he misled the plaintiff to sue him, by not saying he had paid it over.¹

61. Where an auctioneer, against whom an action was brought to recover the deposit upon the ground that the vendor's title was defective, applied for an interpleader rule, and it appeared that the vendor had no other property, the Court refused the application, unless the defendant gave security for costs; and refused to allow the defendant his costs of the application out of the deposit.²

62. Where the vendor of an estate at auction is unable to make a good title, the purchaser cannot recover the deposit from him, as money had and received, though paid over to him. The remedy is against the auctioneer, who is the agent for both parties, to appropriate the deposit to the party entitled to it.³

63. If the purchaser demands his deposit at the day for completing the contract, and the vendor has not delivered his abstract before that time, and also neglects to deliver it until after an action brought for the deposit, it is evidence of an abandonment of the contract by the vendor; who shall not be entitled afterwards to a specific performance.⁴

64. If a party has given a bill of exchange or check for the amount of a deposit on a sale by auction, any ground on which he could recover back his deposit, if paid in money, will be good ground of defence, in an action upon the bill or check.⁵ A party gave a check for the amount of a deposit on a sale by auction, which sale was void. In an action on the check, he pleaded that there was no consideration for the check; and the plaintiff replied, that there was consideration. Held, on this issue, the defendant must begin.⁶

65. Relief may be granted against forfeiture of the deposit, upon putting the other party in the same situation as if the contract had been performed at the time agreed.⁷

¹ *Edwards v. Hodding*, 5 Taunt. 815.

² *Deller v. Pickett*, 2 Eng. Law & Eq. 232.

³ *Johnson v. Roberts*, 30 Eng. Law & Eq. 234.

⁴ *Lloyd v. Collett*, 4 Ves. 690, n.; *Radcliffe v. Warrington*, 12 Ves. 376.

⁵ *Mills v. Oddy*, 6 Carr. & P. 728.

⁶ *Ibid.*

⁷ *Moss v. Matthews*, 3 Ves. 279.

66. A purchaser before a master, submitting to forfeit his deposit, is not bound to proceed in the purchase.¹

67. The Court will not compel a vendor to pay the deposit money into Court, though he retains possession of the estate, if the delay in the completion of the contract is occasioned by the purchaser.²

68. A vendor, resisting an application by the purchaser for payment into Court of the deposit, in the hands of the vendor's agent, was charged with a loss by the agent's failure.³

69. Where a contract for the sale of land has been abandoned, and an action is brought for the deposit, and the plaintiff declares specially on the contract, he must prove it to have been a valid one, by a note in writing, even though the sale was by auction.⁴

70. A party recovering back a deposit, paid on the purchase of real property, is not entitled to interest.⁵

71. Sale by auction. The auctioneer, as agent for the vendor, agrees to sell according to the conditions. By these, the purchaser is to pay down immediately a deposit, and the auction duty, and the residue of the purchase-money upon a day certain, on having a good title; and the vendor is to prepare and deliver an abstract. Held, the auctioneer, upon a failure of the contract in consequence of a defective title, is not personally responsible for interest upon the deposit and auction duty, unless the money be demanded, or notice given him that the contract has been rescinded.⁶

72. Where an auctioneer has sold an estate, the title of which being objected to, he refuses to return the deposit, and an action is brought, in which he afterwards pays the costs; he cannot recover these costs against the principal in an action for money paid to his use, but must declare specially.⁷

¹ *Savile v. Savile*, 1 P. Wms. 745.

² *Wynne v. Griffith*, 1 Sim. & St. 147.

³ *Fenton v. Browne*, 14 Ves. 143.

⁴ *Walker v. Constable*, 2 Esp. 659;
1 Bos. & Pull. 306.

⁵ *Bradshaw v. Bennet*, 5 Car. & P. 48.

⁶ *Gaby v. Driver*, 2 You. & Jerv. 549.

⁷ *Spurrier v. Elderton*, 5 Esp. 1.

73. An auctioneer, who is sued for a deposit, and pays it into Court, under an order for the vendor and purchaser to interplead, is entitled, upon the termination of proceedings between the vendor and purchaser, to receive his costs out of the deposit-money.¹

74. In *assumpsit* by vendee against vendor to recover back a deposit paid on the purchase of real property, the defendant at the trial produced (under a notice to produce) the agreement, which had been signed at the foot of the conditions of sale. Held, that it was not necessary to call the subscribing witness to prove the execution of this agreement.²

¹ *Pitchers v. Edney*, 4 Bing. N. 721.

² *Bradshaw v. Bennet*, 5 Carr. & P. 48.

CHAPTER VII.

STATUTE OF FRAUDS.

1. *Form* of contracts for the sale and purchase of lands. Statute of Frauds.

2. What property is within the statute; products of the soil; growing wood, &c.

7. Other property connected with the *reality*.

10. Property not within the statute; products of the soil, &c.

14. Paper securities relating to land.

15. Agreement as to *boundary*.

16. Whether the statute applies to a claim for the *price*.

23. Construction of the statute as to the form of executing a written memorandum; what is a *signing*; reference of different papers to each other, &c.

40. Form of pleading or relying upon the statute.

1. IN the natural order of subjects, we proceed to consider the *forms* in which contracts for the sale and purchase of lands must be made. (a) By the common law, contracts

(a) With regard to the formalities requisite in a contract for the sale of lands, such contract is held good without a *seal*. *Worrall v. Munn*, 1 Seld. 229.

In England, questions have frequently arisen, with regard to the necessity and effect of a *stamp*, in contracts of this nature.

An instrument, purporting to be a receipt for purchase-money, but insufficient, as such, for want of a stamp, is still admissible, it seems, as evidence of an agreement for sale, if it contain the requisite terms. *Evans v. Prothero*, 13 Eng. Law and Eq. 163. See *Smith v. Wyley*, 17 Eng. Law and Eq. 49.

A receipt for purchase-money has been allowed to be stamped as an agreement during the hearing. *Coles v. Trecothick*, 9 Ves. 234.

But the Court cannot sanction an agreement, that an objection for want of a stamp shall be waived; if, therefore, the objection comes to the knowledge of the Court, no decree will be made, until the instrument, duly stamped, is produced to the registrar. *Owen v. Thomas*, 3 Myl. & Kee. 353. Where the same paper contains two different contracts, for the purchase of different lots, by different persons; one stamp affixed to that part of the paper which contains the contract with the defendant, and to which the stamp officer's receipt for one penalty refers, is sufficient for such contract. *Powell v. Edmunds*, 12 E. 6.

may be either written or unwritten; and a contract for the sale of land does not differ, in this respect, from others. But, by an English statute, 29 Car. II. ch. 3, commonly called the *Statute of Frauds*, which has probably been adopted, copied, or closely imitated, in every State of the Union, (a)

(a) It is said, in Kentucky, the decisions of the courts of Great Britain, upon their statute against frauds and perjuries, are to be respected, only so far as they enlighten the understanding or convince the judgment; not as evidences of the proper construction of a similar statute of Kentucky. *Grant v. Craigmiles*, 1 Bibb, 203.

With regard to the general purpose and policy of the statute, it is said in a recent case: "The great purpose of the enactments commonly known as the Statute of Frauds, is to guard against the commission of perjury in the proof of certain contracts. This is effected by providing that mere parol proof of such contracts shall be insufficient to establish them in a court of justice. In regard to contracts for sales of goods, one mode of proof which the statute adopts to secure this object, is the delivery of part of the goods sold. But this provision does not effectually prevent the commission of perjury; it only renders it less probable, by rendering proof in support of the contract more difficult. So, in regard to other provisions of the same statute; perjury is not entirely prevented by them; the handwriting of a party to be charged, or the agency of the person acting in his behalf, may still be proved by the testimony of witnesses who swear falsely. Absolute prevention of perjury is not possible." Per Bigelow, J., *Marsh v. Hyde*, 3 Gray, 332.

It is also said, "The statute dispenses with no proof of *consideration* which was previously required, and gives no efficacy to written contracts which they did not previously possess. Its policy is to impose such requisites upon private transfers of property as, without being hindrances to fair transactions, may be either totally inconsistent with dishonest projects, or tend to multiply the chances of detection." 1 Greenl. Ev. § 262. As to the distinction between the Statute of Frauds, and the rule of *common law*, which excludes parol evidence concerning written contracts, see *Cuff v. Penn*, 1 M. & S. 26.

As to the utility and proper *construction* of the Statute of Frauds, eminent Judges have expressed themselves as follows: Chief Justice Best, says, (*Proctor v. Jones*, 2 C. & P. 534,) "The Statute of Frauds and the Statute of Limitations were both so much objected to when they were passed, that the Judges appeared anxious to get them off the statute-book. But in later times, they have become desirous to give them their full effect. I think the Statute of Frauds is a good and wholesome statute. In other countries, contracts are made in writing." Bayley, J., says, (*Carter v. Toussaint*, 5 B. &

contracts for the sale of lands are required to be in writing. (a) The words of the English statute are as follows: "No action shall be brought, whereby to charge any person

A. 859,) that the Statute of Frauds is a remedial law, and the Court ought not to endeavor to strain words to take a case out of it. Chief Justice Abbott says, (*Howe v. Palmer*, *Tempest v. Fitzgerald*, 3 B. & A. 323, 683,) "The Statute of Frauds was made for wise and beneficial purposes, and ought to be construed according to the plain meaning of the legislature. It is a highly beneficial and remedial statute." Best, J., says, (*Howe v. Palmer*, 3 B. & A. 326,) so far from being disposed to restrain the provisions of this statute, I should be inclined to extend them.—"It is better to adhere to the words of the statute, unless we plainly see that the words used do not express the meaning of the legislature." Lord Kenyon says, (*Chaplin v. Rogers*, 1 E. 194,) it is of great consequence to preserve unimpaired the several provisions of the Statute of Frauds, which is one of the wisest laws in our statute-book." Weston, J., says, (*Phillips v. Hunnewell*, 4 Greenl. 380,) "The Statute of Frauds is a very beneficial act; and its objects are best secured by adhering strictly to its provisions, unless in cases which clearly do not fall within the meaning."

Whether the Statute of Frauds, in requiring that in certain cases the "agreement" be proved by writing, requires that the consideration should be expressed in the writing as part of the agreement, is a point which has been much discussed, and upon which the English, and some American cases, are in direct opposition. The English Courts hold the affirmative. See *Wain v. Warlters*, 5 E. 10; reviewed and confirmed in *Saunders v. Wakefield*, 4 B. & Ald. 595. And their construction has been followed in New York; *Sears v. Brink*, 3 Johns. 210; *Leonard v. Vredenburg*, 8 Johns. 29. In New Hampshire, in *Neelson v. Sanborne*, 2 N. Hamp. 414, the same construction seems to be recognized and approved. But in Massachusetts, it was rejected by the whole Court, upon great consideration, in *Packard v. Richardson*, 17 Mass. 122. So, in Maine, *Levy v. Merrill*, 4 Greenl. 180; in Connecticut, *Sage v. Wilcox*, 6 Conn. 81; in New Jersey, *Buckley v. Beardsley*, 2 South. 570; and in North Carolina, *Miller v. Irvine*, 1 Dev. & Batt. 103; and now in South Carolina, *Fyler v. Givens*, *Riley's Law Cas.* 56, 62, overruling *Stephens v. Winn*, 2 N. & McC. 372, n.; *Woodward v. Pickett*, *Dudley*, 30. See also *Violet v. Patton*, 5 Cranch, 142;

(a) Where the verbal evidence of an agreement is contradictory, the Statute of Frauds ought especially to apply against it. *Rowton v. Rowton*, 1 Hen. & Munf. 92.

upon any agreement made upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement, upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully, authorized."

2. The statute contemplates a transfer of lands, or some interest in them ;¹ and one of the questions most frequently arising in the construction of this statute is, to what property it applies ; or, in other words, what are *lands* within the meaning of the statute. This question has for the most part occurred, with reference to growing and movable products of the land, which are attached to, though not strictly making part of, the soil.

3. It has been held, that growing trees are real estate, and cannot pass, except by an instrument in writing.² So, where they are to be taken by the purchaser within a certain time.³ Thus, the sale of growing timber, with an agreement that the purchaser should have twenty-five years to remove it, was held within the statute, upon the ground that it purported to transfer an interest in land, as the vendee was to have the timber remain and grow, if he pleased, and remove it whenever he might see fit, during the period prescribed.⁴

¹ Bostwick v. Leach, 3 Day, 476.

³ Patney v. Day, 6 N. H. 430.

² Pierrepont v. Barnard, 5 Barb. 364.

⁴ Olmstead v. Miles, 7 N. H. 522 ;
See Burgett v. Bissell, 14 Barb. 638. Green v. Armstrong, 1 Denio, 550. See

Taylor v. Ross, 3 Yerg. 330 ; 3 Kent's Comm. 122 ; 2 Stark. Evid. 350, 6th Am. ed. ; 1 Greenl. Ev. § 268, n. 3.

It has been held in California that a parol agreement for the sale of land, made before the adoption of the common law, or the reenactment of the Statute of Frauds, is void, unless possession be taken, or part payment made. Harris v. Brown, 1 Cal. 98 ; Hoen v. Simmons, Ib. 119.

But performance will be decreed, if the sale is *in presenti*, the title-deed delivered, possession taken, and valuable improvements made, to such an extent as to work a fraud upon the vendee if his title should fail. Tohler v. Folsom, Ib. 207. See Albert v. Ross, 5 Md. 66.

So, it is held, that an agreement for the sale of *growing pears* is an agreement for the sale of an interest in land, because they would pass to the heirs, not to the executor.¹ So, in case of a verbal purchase of a growing crop of *grass*, with liberty to go on the close, for the purpose of cutting and carrying it away; held, the purchaser could not maintain trespass against the seller, for taking away his horse and cart from the close, which he had brought there for the purpose of carrying away the grass; the action, in substance, charging the defendant *on the contract*, within the statute.² So, although one who has contracted with the owner of a close, for the purchase of a growing crop of grass there, to be mown and made into hay, has such an exclusive possession, though for a limited purpose, that he may maintain trespass *qu. cl.* against any person entering the close and taking the grass, even with the assent of the owner; still, this being a contract or sale of an interest in or concerning land, it may be discharged by parol notice from the owner, before any part execution.³ So, a sale of growing turnips, no time being stipulated for their removal, and the degree of their maturity not being positively found, is a sale of an interest in land, and must be in writing.⁴ So, the sale of growing underwood, to be cut by the purchaser, confers an interest in land, under the statute.⁵ (a)

4. Declaration that the plaintiff was possessed of a farm,

Austin v. Sawyer, 9 Com. 39; Whipple v. Foot, 2 Johns. 422; Stewart v. Dougherty, 9 Johns. 112.

¹ Rodwell v. Phillips, 9 M. & W. 501.

² Carrington v. Roots, 1 Mees. & W. 248.

³ Crosby v. Wadsworth, 6 East. 610, (a leading case.) See Frear v. Hardenburgh, 5 Johns. 272.

⁴ Emmerson v. Heelis, 2 Taunt. 38.

⁵ Scorell v. Boxall, 1 You. & Jerv. 396.

(a) Verbal sale of growing wood, by the defendant, with a right to cut it within a certain time, but without any express authority to assign the contract. The purchaser cut part of the wood, left it on the land, and sold it, with all his rights under the contract, to the plaintiff, whom the defendant authorized to remove the remaining wood, but afterwards revoked the authority, and burned the wood. Held, he was liable to an action for so doing. Nelson v. Nelson, (Mass.) Law Rep. Nov. 1856, p. 411.

upon which were growing crops, and on which the plaintiff had done work and labor and expended materials, in making the lands ready for tillage, of which work the plaintiff had not derived the benefit; and that, in consideration that the plaintiff would let the farm to the defendant for fourteen years, the defendant undertook to take the crops and pay for them, and for the work, according to a valuation; that the plaintiff let the farm accordingly, and left the crops upon it, and the defendant took possession and had the benefit of the work, &c., and the valuation was made, but the defendant did not pay. Plea, that the crops, and the benefit of the work, &c., were not excepted or reserved out of the letting or agreement to let, and there was no agreement in writing in respect of those causes of action, or any memorandum or note thereof, signed by the defendant or any person by him lawfully authorized. Held, on demurrer, that the contract was for an interest in land, and the right to the crops, and the benefit of the work and labor, were both of them an interest in land, within the 4th section of the Statute of Frauds.¹

5. *Indebitatus* count, for crops bargained and sold, accepted and taken, had and received, and cut down by the defendant. Plea, that the crops, at the time of the bargain and sale, were growing upon and affixed to certain lands; and, before the bargain and sale, there was a treaty on foot between the plaintiff and the defendant, proposing that the plaintiff should let the lands to the defendant, and the defendant take therewith the crops; that the defendant assented to the treaty; and, in order to carry it into effect, the supposed bargain and sale was verbally contracted; and there was no agreement in writing, or any memorandum or note thereof. Held, the crops were at the time of the bargain and sale an interest in the land, and the case was within the statute. And the same point was held, on a similar plea, to a count for work, labor, and materials.²

¹ Falmouth v. Thomas, 1 Crompt. & Mees. 89.

² Ibid.

6. *Indebitatus assumpsit* upon an account stated. Plea, that, before the taking of the account, there was a verbal agreement for the sale of crops growing upon the plaintiff's land, and for work, labor, and materials, done and used in preparing the land for tillage; and a treaty for the plaintiff's letting and the defendant's taking the land for fourteen years, to which the defendant assented; and that the money to be paid for the crops, and the work, &c., was the money concerning which the account was stated; and there was no agreement in writing, nor any note thereof. Replication, that before the account was stated, the defendant had mown the crops, and taken them to his own use, and had and received the amount of the work and labor and materials. Rejoinder, traversing that defendant had cut down the crops, and received the amount of the work and labor, &c., before the stating of the account. General demurrer: Held, the contract, as appearing on the pleadings, was within the statute, and the plaintiff could not recover.¹

7. The same question has arisen, and the same rule been adopted, in reference to other kinds of property, not being strictly real estate, but partaking, more or less, of the character of chattels.

8. Declaration in *assumpsit*, that the plaintiff was desirous of taking a furnished house as a school; that the defendant was possessed of a house in part furnished, and all other furniture necessary for the completely furnishing the same, and thereupon, in consideration that the plaintiff, at the request of the defendant, would take possession of said house, and would, if the furniture necessary for the completely furnishing said house, for the purpose aforesaid, should be sent into said house by the defendant, within a reasonable time, become the tenant of the house, with the furniture, at the rent aforesaid, and pay the rent quarterly, commencing, &c., the defendant promised the plaintiff that he would, within a reasonable time, after the plaintiff should

¹ Falmouth v. Thomas, 1 Crompt. & Mees. 89.

have so taken possession, send into the house all the furniture necessary for furnishing the house with furniture of good quality. That the defendant took possession of the house, but the articles of furniture sent were not of good quality, and all the furniture necessary for the furnishing was not sent in. Plea, that there was no note or memorandum in writing of the promise stated. Held, on demurrer, that the promise related to land, and no action could be maintained upon it.¹ (a)

9. The statute applies to a contract, for the sale of a "right to dig and carry away ore" from the mine of another person.² But a verbal contract for such right is valid as a *license*, and a protection to the party acting under it, and vests in him a title to the ore actually taken.³ But the license is revocable, personal, and not assignable.⁴ (See ch. 8.) So, a right of permanently overflowing the land of another, by a mill-dam to be constructed below his line, is a *hereditament*; and a contract for the sale of it must, therefore, be in writing.⁵ So, a contract made by an owner of land with the commissioners, under the act relative to draining the drowned lands in Orange County, (Sess. 30, ch. 25,) by which they were allowed to use each bank of the River Wallkill, &c., which they might find necessary, in removing all obstructions, and in deepening and widening the river, &c., and to use, occupy, and

¹ *Meehelen v. Wallace*, 2 Nev. & Perr. 224; 7 Ad. & Ell. 49.

³ *Ibid.*

⁴ *Ibid.*

² *Riddle v. Brown*, 20 Ala. 412.

⁵ *Bridges v. Pureell*, 1 Dev. & Bat. 192; *Harris v. Miller*, 1 Meigs, 158.

(a) A parol contract for the sale of both real and personal property, if entire, and founded on one consideration, being void as to the former, is void for the whole. So held, in case of the sale of wood or timber composing a broken-down mill in connection with the mill-site, &c. *Thayer v. Rock*, 13 Wend. 53.

Contract to hire a shop at a certain rent, and pay the landlord the expense of fitting it up. Held, an entire contract, and within the Statute of Frauds, as it concerned an interest in lands. *McMullen v. Riley*, (Mass.) Law Rep. Dec. 1856, p. 439.

enjoy the same, and for which they were to pay a compensation to the owner for the damages, and who agreed to allow them to cut a canal through his lands, was held to be a contract concerning an interest in lands, within the statute.¹ So, in New York, the statute applies to the sale of a *pew*.² So, the statute has been held to apply to the sale of a leasehold interest. Thus, an agreement by a tenant for a sale and delivery of the premises, the purchaser agreeing to pay the rent, rates, and taxes, is within the statute.³ So, a claim for specific performance stated, that the defendant had agreed in writing, to demise a house to the plaintiff, for a certain term and rent, and that the plaintiff at the same time agreed by parol to pay the plaintiff a premium of £200; and prayed that a lease be granted, offering to pay the premium. Claim dismissed.⁴ So, A. and B. severally negotiating to purchase a house and land agreed by parol, that A. should withdraw and B. purchase, giving to A. a part of the ground, at a proportionable price. B. purchased, but refused to perform the agreement. Held, within the statute.⁵

10. With reference, however, to the sale of things growing upon the land, decisions have been made, somewhat conflicting with those already cited.⁶ (a) In general terms, it

¹ Phillips v. Thompson, 1 Johns. Ch. 131.

² Vielie v. Osgood, 8 Barb. 130.

³ Smart v. Harding, 29 Eng. Law & Eq. 252.

⁴ Martin v. Pycroft, 11 Eng. Law & Eq. 110.

⁵ Lamas v. Bayly, 2 Vern. 627.

⁶ Jenkes v. White, 14 Eng. Law & Eq. 350; Sweeny v. Miller, 34 Maine, 388; Preble v. Baldwin, 6 Cush. 549; Parker v. Staniland, 11 E. 362.

(a) It is said, "No general rule is laid down in any one of them, that is not contradicted by some others." Per Ld. Abinger, *Rodwell v. Phillips*, 9 M. & W. 505. The distinction upon this point has been supposed to depend on the question, whether the subject of contract, being part of the inheritance, is to be severed and delivered by the vendor as a chattel; or whether a right of entry is given to the purchaser to cut and take the property; the 4th section of the statute being applicable to the latter case, but not to the former; which, however, would fall within the 17th section, relating to the sale of *goods*. Long on Sales, (Rand.) 80-1. But it is said, the later English and the American authorities do not seem to recognize such distinction.

is said, a contract for the sale of things annexed to the freehold, but which are capable of separation without violence, and by the terms of the contract are to be separated, is not within the statute.¹ So, it is said, a contract for the sale of a growing crop, for example, a crop of potatoes, is essentially the same, whether they are covered with earth in a field, or stored in a box; in either case, the thing sold is but a personal chattel, and so not within the statute.² So it has been held, that a contract for the sale of growing wood and timber, to be cut and removed by the purchaser, is not within the statute; the effect of it being, to pass an interest in the trees when severed, but not any interest in the land.³ So, an agreement for the sale of mulberry trees, growing in a nursery, and raised to be sold and transplanted, and to be delivered on the ground where they are growing, on payment being made.⁴ So, an agreement that a person, not the owner of the land, may cut down the trees, peel them, and take the bark.⁵ So, grass already grown and in a condition to be cut may be sold by parol.⁶ (a)

11. Plaintiff and defendant orally agreed (in August) that defendant should give £45 for the crop of corn on plaintiff's land, and the profit of the stubble afterwards; that plaintiff's cattle might run with defendant's; that defendant should have some potatoes growing on the land, and whatever lay grass was in the fields; should harvest the corn and dig up the potatoes; and plaintiff pay the tithe. Held, not a con-

¹ *Bostwick v. Leach*, 3 Day, 476.

² *Warwick v. Bruce*, 2 M. & S. 205.

³ *Clafin v. Carpenter*, 4 Met. 580;

Cain v. McGuire, 13 B. Mon. 340;

Erskine v. Plummer, 7 Greenl. 447.

⁴ *Whitmarsh v. Walker*, 1 Met. 313.

⁵ *Nettleton v. Sikes*, 8 Met. 34.

⁶ *Cutler v. Pope*, 13 Maine, 380.

(a) Agreement, for the purchase of the herbage of a close for five months, for £45; £10 to be paid down, and a joint promissory note given for the residue, payable within the five months; the lessee to yield up possession at the end of that time, and, if he failed to give a satisfactory note, the vendor to be at liberty to relet the premises. Held, sufficiently stamped with a £1 stamp. *Cattle v. Gamble*, 5 Bing. N. R. 46.

tract for any interest in land, but a sale of goods and chattels, as to all but the lay grass; and, as to that, a contract for the agistment of defendant's cattle.¹ So, where the defendant, in June, agreed to sell to the plaintiff the potatoes then growing on land of the defendant at 2s. per sack, the plaintiff to have them at the digging up time, (October,) and to find diggers; held, not a contract for the sale of an interest in land.² So, a verbal agreement, made on the 25th of September, for the sale of a then growing crop of potatoes, is not a contract or sale of any lands, tenements, or hereditaments, or any interest in or concerning them.³ So, the plaintiff verbally agreed with the defendant, to sell him the timber growing on his land at so much per foot. Defendant afterwards offered to sell the butts of the trees to a third person, and said he would convert the tops into building stuff. Plaintiff afterwards, by letter, required defendant to pay for the timber which he had bought of him. Defendant wrote a letter in answer, stating that he had bought the timber, but that he had bought it to be sound and good, and it was not so. Held, the contract was not a contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning the same, within the statute.⁴

12. Assumpsit, for goods sold, and on an account stated, to recover the value of growing poles, purchased from the plaintiff by the defendants, and afterwards carried away by them. At the time of the bargain, some memorandums in writing had been made, but neither stamped nor signed. The defendants, after the poles were carried away, admitted that a balance was due to the plaintiff. Held, a nonsuit was rightly ordered, as the defendants had not admitted a precise and definite sum to be due to the plaintiff, and therefore he could not recover on the account stated, without reference to the memorandums, which were not admissible in evidence; but, as the contract had been executed by the defendants,

¹ Jones v. Flint, 10 Ad. & Ell. 753.

² Sainsbury v. Matthews, 4 Mees. & Wels. 343.

³ Evans v. Roberts, 5 Barn. & Cress.

829.

⁴ Smith v. Surman, 9 Barn. & Cress. 566.

they having carried away the poles, the Court granted the plaintiff a new trial, on payment of costs.¹

13. A parol contract for the sale of improvements on the public lands is valid.² So a contract for the sale of improvements on land, consisting of houses, is not within the statute.³ Nor an agreement by a tenant at will to transfer his title, as he has no assignable interest.⁴ Nor an agreement not to exercise a right regarding the freehold, as to use a mill, or to carry on a trade in a particular shop.⁵

14. The question has arisen, whether the statute applies to the transfer of *paper securities*, relating to the title to lands. It has been held, that a contract for the sale of a bond secured by mortgage of lands is within the statute.⁶ So, a parol agreement to execute a covenant to convey is within the statute.⁷ More especially *at law*.⁸ So, where the defendant contracted in writing to purchase land at a certain price, and the plaintiff, by parol, agreed with the purchaser to purchase his interest in the contract, and the latter, by an indorsement on the contract, ordered the vendor to convey to the plaintiff; held, the plaintiff could not maintain an action against the defendant.⁹ But an agreement to locate land certificates and procure patents, in consideration of a good title to half the land, is not within the statute.¹⁰

15. The statute applies to a parol agreement to straighten a crooked line, up to which the party has occupied long enough to give him a possessory title.¹¹

16. The question, whether a contract is within the statute, has more commonly arisen with reference to the liability of the vendor; but sometimes, in connection with a claim for the price, against the vendee. (a)

¹ Teall v. Anty, 4 Moo. 542.

² Zickafosse v. Hulick, 1 Morr. 175.

³ Cassell v. Collins, 23 Ala. 676.

⁴ Whittemore v. Gibbs, 4 Fost. 484.

⁵ Bostwick v. Leach, 3 Day, 476.

⁶ Toppin v. Lomas, 30 Eng. Law & Eq. 426.

⁷ Ledford v. Ferrell, 12 Ired. 285.

⁸ Yates v. Martin, 1 Chandl. 118.

⁹ Simms v. Killian, 12 Ired. 252.

¹⁰ Watkins v. Gilkerson, 10 Tex. 340.

See Maxwell v. Wallace, 1 Bush. Eq. 251.

¹¹ Davis v. Townsend, 10 Barb. 333.

(a) The statute does not apply to an action relating merely to the *price* of land. Thayer v. Viles, 23 Verm. 494.

17. Upon this subject, it is held, that in order to recover the price of land sold, there must be a contract, subscribed by the vendor, and assented to, or accepted by the purchaser.¹ So, no action lies, for the price of land sold by parol contract, no part of it having been paid, nor possession taken, though a deed has been tendered by the seller, but not accepted.²

18. The plaintiff verbally sold to the defendant his interest in a farm, the defendant agreeing to "step into his shoes," and clear him of certain mortgage notes, and of a note for \$50, made to the mortgagee, with surety, and indorsed upon the mortgage note as part payment. The defendant entered, and six years after the sale, the plaintiff paid half the \$50 note and costs, and brings this action therefor. Held, as the defendant was not legally bound by the contract, it being a contract for the sale of lands, within the Statute of Frauds, the action did not lie.³

19. A purchaser of land under incumbrance, who receives a conveyance without covenants, cannot set up a concurrent parol agreement on the part of the grantor to pay off the incumbrances; for such agreement is parcel of an entire agreement for the sale of lands.⁴ So, where A. sold land to B., and gave his bond to make title, on B.'s verbal promise to pay a debt, which A. owed to C.; held, this was not void by the statute, as a promise to pay the debt of a third person, but was void as a contract for the sale of real estate.⁵ So it has been held, that a note or memorandum is insufficient, unless it furnish evidence of *price*, and the amount thereof, this being an essential part of the contract.⁶ Therefore a letter written by the purchaser, subsequent to a sale by auction, and addressed to the vendor, will not take the case out of the statute, if it only contain a statement of the contract for the purchase, but exhibit no particular of the

¹ Reynolds v. Dunkirk, &c. 17 Barb. 613.

² Lester v. Bartlett, 2 Cart. 628.

³ Davis v. Farr, 26 Verm. 592.

⁴ Duncan v. Blair, 5 Denio, 196.

⁵ Rice v. Carter, 11 Ired. 298.

⁶ Ide v. Stanton, 15 Verm. 685.

price, nor refer to any other writing which does so. So, though the letter refer to certain notes, tendered in payment, which notes are not before the Court.¹

20. But a promise by the purchaser of land, at the time of the conveyance, to pay the taxes that are or may be assessed thereon, for the current year, is not "a contract for the sale of lands, &c., or of any interest in or concerning the same."² So, where A., who had mortgaged land to B., sold the land to C., on the parol agreement that C. should pay the mortgage debt, and that B. should release his mortgage. Held, the promise of C. was not within the statute.³ So, A. promised B. to pay him \$1,000 at his death, if he would sell his estate and purchase his own farm at a stipulated price, and come and reside there. B. did sell his farm, and bought A.'s farm, and removed there with his family. Held, the promise was not within the statute.⁴ So, A. entered on B.'s land, and, without his knowledge or authority, cleared it, made improvements, erected buildings, &c. B. afterwards agreed by parol with A., (against whom he had brought an ejectment for possession,) that he would sell the land to A. as wild land, or pay him for the improvements. Held, though the promise to sell was void, the promise to pay for the improvements was not within the statute, though void for want of consideration.⁵ So, where one in possession of land, on which he had made improvements, agreed to transfer it; and the purchaser verbally promised to pay for the improvements; held, the promise was not within the statute.⁶ So, the plaintiff conveyed to the defendant a tract of land, as containing 110 acres, at \$8 per acre; with a verbal agreement for a survey, and, if there proved to be less than 110 acres, the plaintiff should refund, if more, the defendant should pay at the same rate for the surplus. Held, not within the statute, and that there was a

¹ *Adams v. M'Millan*, 7 Port. 73.

² *Brackett v. Evans*, 1 Cush. 79.

³ *Simonton v. Gandolfo*, 2 Florida, 392.

⁴ *King v. Hanna*, 9 B. Mon. 369.

⁵ *Frear v. Hardenbergh*, 5 Johns. 272.

⁶ *Benedict v. Beebee*, 11 Johns. 145.

sufficient consideration for the promise of the defendant.¹ So, extrinsic evidence may be offered of the price paid, where the instrument or memorandum is certain and unambiguous.² So, a letter, promising to make a deed of land "according to contract," is sufficient, though the terms are not mentioned, if the party claiming the conveyance can prove the price by one witness.³ So, a receipt for the purchase-money may constitute a sufficient agreement, provided it show on its face, or by reference to some other instrument, every material part of a valid contract.⁴ So, a receipt, acknowledging payment of money, in these words: "In part-payment of the tract of land that I was interested in, and sold by the sheriff, and purchased by Col. C. L. Goodwin, and which land was sold by C. L. Goodwin to Benj. Hatcher; this is in part-payment, to redeem the said land from Benj. Hatcher," was held a sufficient memorandum of the agreement.⁵ So, where there was a parol agreement, that one party should hold an estate, and reconvey to the other on payment of the purchase-money and interest; held, that credits and charges on the books of the former in regard to the estate, and conformable to the agreement, were sufficient to take the case out of the statute.⁶

21. The plaintiff and defendant enter into an indenture, in which, after a recital that they are "in possession and improvement, and are principal owners of a certain water privilege with the buildings thereon, machinery, fixtures, &c.," the plaintiff agrees to convey, and the defendant to receive and pay for, "all the plaintiff's right, &c., of the above described premises, consisting of, &c.; also the saw mill, with every privilege, &c.," at such prices as shall be awarded by three men, to be chosen, &c., and for the fulfilment of the agreement they bind themselves, each to the other, under the penalty of \$1,000, &c. A price having been fixed by such

¹ Garret v. Malone, 8 Rich. 335.

² Hatcher v. Hatcher, 1 McM. Eq. 21, 311, 318.

³ Johnson v. Ronald, 4 Munf. 77.

⁴ Barickman v. Kuykendall, 6 Blackf.

⁵ Hatcher v. Hatcher, 1 McM. Eq. 311.

⁶ Tufts v. Tufts, 3 W. & M. 456.

referees, held, the defendant could not object, that, by the Statute of Frauds, the indenture was invalid, because the referees and the price were not ascertained by the indenture itself.¹

22. A contract for the sale of lands, signed and sealed by the vendor only, and delivered to, and accepted by the vendee, purported to contain, on the part of the latter, a covenant to pay the consideration money; and was recognized and ratified, on the part of the vendees, by an indorsement under their hands and seals. Held, a sufficient signing; and the indorsement not containing in itself, or amounting, when taken in connection with the original contract, to a covenant to pay, and the vendor having tendered a conveyance; held, he might maintain *indebitatus assumpsit* for the consideration. But if the indorsement had amounted to a covenant to pay, the action must have been covenant or debt.²

23. The question has often been raised, whether a *strict and literal* compliance with the requirements of the Statute of Frauds is necessary to the validity of a contract, relating to the sale of lands. Upon this subject, it is held, as the prevailing doctrine, that a *liberal* construction is to be given to the statute; and, where an agreement has been reduced to a certainty, and the substance of the statute complied with in the material part, the forms have never been insisted upon.³ (a) Thus, a written admission of a previous parol contract is sufficient.⁴ It is also held, that a memorandum in writing of the sale of lands will be sufficient within the statute, if it be signed *by the party to be charged*, more especially when followed by a direction to the attorney to

¹ Brown v. Bellows, 4 Pick. 179.

² Gale v. Nixon, 6 Cow. 445.

³ Welford v. Beazely, 3 Atk. 503.

⁴ Ide v. Stanton, 15 Verm. 685.

(a) The statute does not require that the particular land contracted to be sold shall be described; it is sufficient that the contract provides for its selection out of the lands of the vendor. Carpenter v. Lockhart, 1 Smith, 326.

prepare a writing for both parties to sign; and contain the essential terms of the contract, expressed with such clearness and certainty, that they may be understood from the writing itself, or some other paper, to which it refers, without resorting to parol proof.¹ Thus, it is sufficient, if the name is so inserted in any part of the instrument, whether the top, middle, or bottom, as to authenticate it, and is applicable to the whole substance of the writing, and put there by the party or his authority.² (a) As where an agreement begins, "I, A. B.," though not signed.³ So, J. R. Bridges, having five freehold houses, but no other property, in Cable Street, Liverpool, agreed to sell them to J. Bleakley for £248; and thereupon drew up the following memorandum: "July 26th, 1839. John Bleakley agrees with J. R. Bridges to take the property in Cable Street for the net sum of £248 10s." Held, the agreement was sufficiently signed by the vendor.⁴ So, if a person who is a party to, and knows the contents of an agreement, subscribes it as a witness only, this has been held a signing within the statute.⁵

24. B. sold W. a tract of land, for a sum of money, payable one half in six months and the remainder in twelve, and a deed was prepared and executed at the same time by B., but remained in his possession. W. paid part of the purchase-money, but afterwards failed; and, upon B.'s offering him a deed, conveying the land, and demanding a com-

¹ Worrall v. Munn, 1 Seld. 229; 112; Barstow v. Gray, 3 Greenl. 409; Fowle v. Freeman, 9 Ves. 351; Goom v. Aflalo, 6 B. & C. 117; Ide v. Stanton, 15 Verm. 685; Smith v. Arnold, 5 Mass. 414; Adams v. McMillan, 7 Port. 73; Packhurst v. Van Cortlandt, 1 Johns. Ch. 274; Getchell v. Jewett, 4 Greenl. 350; Shirley v. Shirley, 7 Blackf. 452; Thornton v. Kempster, 5 Taun. 788; Russell v. Nixon, 3 Wend. 189; McCrea v. Purmort, 16 Wend. 460; Clason v. Bailey, 14 Johns. 487.

² Ogilvie v. Foljambe, 3 Meri. 53; Anderson v. Harold, 10 Ohio, 399; Higdon v. Thomas, 1 Harr. & G. 130.

³ Knight v. Crockford, 1 Esp. Ca. 189.

⁴ Bleakley v. Smith, 11 Sim. 150.

⁵ Welford v. Beazely, 3 Atk. 503.

(a) In New York, *printing* the vendor's name at the foot of the contract is not sufficient. *Vielie v. Osgood*, 8 Barb. 130. There must be an actual manual subscription at the end of the contract. *Ibid.*

pliance with the contract on his part, W. declined, on the ground of inability to pay the sum due. B. then declared the contract to be at an end, and went on to improve the lands in his possession, at the same time refusing to give up that portion of the purchase-money received. Upon an action for specific performance, held, the deed took the case out of the statute.¹ So, a written notice, signed, referring to a written proposal, not signed, and made several years before, may be so connected with it, as to render the two documents a binding contract.² So, decrees may be founded upon letters, not intended at the time to be a complete, final agreement.³ So, a deed defectively executed is evidence of a parol agreement to convey land.⁴ So, where parties agree to exchange lands, a deed executed by one of them, though not delivered, is a sufficient memorandum to bind him.⁵ (a) So, a bond, reciting the names of the parties to, and the terms of, a contract for the sale of land, and conditioned to secure a performance of such contract, prepared and written by the vendee and obligee, and executed by an agent of the vendor, and delivered by him to the vendee; is a sufficient signing.⁶

25. So, where a contract in writing, or note, exists, which binds one party, any subsequent note in writing, signed by the other, binds him, provided it either contains in itself the terms, or refers to any writing which contains them.⁷

26. Thus, the purchaser of lands at auction signed a memorandum of the contract, indorsed on the particulars

¹ *Bowles v. Woodson*, 6 Gratt. 78.

⁵ *Parrill v. McKinley*, 9 Gratt. 1.

² *Lowry v. Dufferin, Jr.* Eq. 287.

⁶ *Higdon v. Thomas*, 1 Harr. & G.

³ *Fowle v. Freeman*, 9 Ves. 351.

130.

⁴ *Somerville v. Trueman*, 4 Harr. & McHen. 252.

⁷ *Dobell v. Hutchinson*, 3 Ad. & Ell. 355.

(a) Contract for the sale of land. The deeds were drawn, the vendor took them home, and wrote to the vendee that they were ready, and requested her to attend and settle the business, but he died before the parties met. Held, not a sufficient agreement in writing. *Givens v. Calder*, 2 De-saus. 171.

and conditions of sale, and referring to them. Afterwards he wrote to the vendor, complaining of a defect in the title, referring to the contract expressly, and renouncing it. The vendor wrote and signed several letters, mentioning the property sold, the names of the parties, and some of the conditions of sale, insisting on one of them, as curing the defect, and demanding the execution of the contract. Held, these letters, as connected with the particulars and conditions, constituted a memorandum in writing, binding upon the vendor under the statute, (s. 4,) although neither the original conditions and particulars, nor the memorandum signed by the purchaser, mentioned or were signed by the vendor.¹ So, where a letter signed by the vendor is combined with his proposal, by a note in the third person, specifying the price.²

27. The defendant purchased leasehold premises at auction, and signed a memorandum of the purchase, on the back of a paper, containing the particulars of the premises, the name of the owner, and the conditions of sale. Held, that the defendant was bound, though no contract was signed by the vendor.³ So, if a party has entered into a parol agreement for a lease, and a draft of it is prepared, though the agreement is void under the statute; yet an indorsement by him, referring to the case on the draft admitting the agreement, is sufficient to bind him.⁴ So, where the reversioner in fee of a house, expectant upon a term, a portion of which has been underlet, agrees by one letter to grant the sub-lessee an extension of the lease at a certain yearly rent, and in another letter fixes the time when the term is to expire; this is a valid agreement, and the sub-lessee has a right to a lease, which shall commence from the expiration of the existing term.⁵

¹ *Dobell v. Hutchinson*, 3 Ad. & Ell. 355.

² *Western v. Russell*, 3 Ves. & Bea. 187.

³ *Laythourp v. Bryant*, 2 Bing. N. C. 735.

⁴ *Shippey v. Derrison*, 5 Esp. Ca. 190.

⁵ *Verlander v. Codd*, Turn. & Russ. 352.

28. But the note or memorandum must state expressly, or by reference, the subject of sale, the terms and the parties, with such certainty as to furnish evidence of a complete agreement. Thus, where the subject of sale was described as "B.'s right in C.'s estate," held, sufficiently certain. But, where the memorandum was a book, on the cover of which was written, "A.'s memorandum of B.'s property received by assignment," and, on a leaf of the book, under the caption, "Sales at auction, 6th March, 1826," was this entry: "B.'s right in C.'s estate, sold to D., \$60;" in an action brought by A., the auctioneer, against D., for the purchase-money, it was held, that the memorandum was fatally defective, because it did not show, with the requisite certainty, that A. was the vendor.¹ So, an imperfect memorandum of a sale by an auctioneer, and a letter addressed by the vendee to the vendor, cannot be so united as to take such sale out of the statute, there being no direct reference in the one to the other, so as, in effect, to render them one, without the aid of parol proof.² So, an agreement cannot be partly in writing and partly in parol, though it may be shown by parol evidence that separate papers both related to, and formed parts of, one contract.³ So, a paper signed by a party, and proposing to convey all the property, cannot be connected by parol with another paper not signed, for the purpose of designating the property meant to be conveyed.⁴

29. The prevailing course of decisions is as above stated, in regard to a liberal construction of the Statute of Frauds. There are cases, however, which give it a more strict interpretation, and require a more exact conformity to its provisions. Thus, in reference to what constitutes a signing. But where one altered a draft with his own hand, for the purchasing an estate; *held*, not a sufficient signing, though the seller afterwards executed the conveyance, and caused it

¹ Nichols v. Johnson, 10 Conn. 192;
Smith v. Arnold, 5 Mas. 414.

² Adams v. McMillan, 7 Port. 73.

³ Moale v. Buchanan, 11 Gill & J.
314.

⁴ Ibid.

to be registered.¹ So the writing of a party's name by himself, in the body of a memorandum of agreement for a lease, is not a *signature*.²

30. So it is held that an *entry*, to be valid, must contain a memorandum of the contract, and state distinctly the article sold, the price, and the purchaser's name. Thus, the following memorandum, found in the books of one deceased: "1841, W. P. to H. C. O. Dr. To four loads of rock, one lot, at one year's credit, \$125;" is too vague and uncertain, to sustain a bill for specific performance of a contract for the purchase of land, against the administrator.³ So an entry in these words, "The tract of land to Wm. Meadows, at \$5.48," is insufficient.⁴ So, where Oliver and Pipkin bought of James some groceries, an ice-house and lot; and a memorandum of the sale was headed, "Invoice of articles purchased by Pipkin and Oliver of James, 29th August, 1836;" and one of the items of sale was stated thus: "One ice-house and lot, \$140;" held, that the contract as to the ice-house and lot was void for uncertainty.⁵ So, the bare entry of a steward, in his lord's contract book with his tenants, is not an evidence of itself, that there is an agreement for a lease between the lord and a tenant.⁶

31. Lease of lands by auction. A writing, delivered by the auctioneer to the highest bidder, and containing a description of the lands, the term for which they were let, and the rent, but not signed by the auctioneer or any of the parties, was held not to be such a minute of the agreement as was required to be stamped, pursuant to Stat. 48 Geo. III. c. 149, nor such a writing as would exclude parol evidence.⁷

32. A., by public advertisement, offered lands to be let for three lives, or thirty-one years. Proposals having been made

¹ *Hawkins v. Holmes*, 1 P. Wms. 770.

² *Stokes v. Moore*, 1 Cox, 219.

³ *Plummer v. Owens*, 1 Busb. Equ. 254.

⁴ *Meadows v. Meadows*, 3 M'C. 458.

⁵ *Popkin v. James*, 1 Humph. 325.

⁶ *Charlewood v. The Duke of Bedford*, 1 Atk. 497.

⁷ *Ramsbottom v. Tunbridge*, 2 Mau. & Selw. 434.

by B. and accepted, an agreement was executed between B. and the agent of A., duly authorized, in which the term was not mentioned. Held, A. was not bound. Also, there being no reference in the agreement to the advertisement, that parol evidence could not be received, to connect the one with the other, so as to ascertain the term.¹

33. It has been questioned whether the receipt, not containing the terms of the agreement, nor referring to any other paper containing it, can have effect as an agreement, within the Statute of Frauds.²

34. A particular in writing for the purchase of an estate is not sufficient within the statute, unless the party purchased by it, or it was shown him at the time of purchase. Hence, if it contain more than the words of the conveyance will in strictness carry, the purchaser cannot compel a specific execution of the residue, on the particular.³

35. Bill for specific performance of an agreement for the sale of lands and chattels. Plea, the Statute of Frauds. The defendant, during the negotiation, delivered a particular of the whole, signed by him. The agreement was afterwards made at a less price. Both parties gave instructions to an attorney to prepare the conveyance; and the defendant delivered to him the particular, as instructions for the deed, which was prepared. Held, not sufficient under the statute.⁴

36. A letter to a solicitor, with directions for preparing the conveyance of land purchased, described generally as the land bought of, (a person named), but not specifying the terms, is not sufficient evidence of a contract within the statute, and the estate will not pass by a will made previous to the conveyance.⁵

37. Where a letter contains the entire terms of an agreement, it is not necessary for the plaintiff to prove that he accepted the terms. If it require the plaintiff to supply a

¹ *Clinan v. Cooke*, 1 Sch. & Lef. 22.

² *Coles v. Trecothick*, 9 Ves. 234.

³ *Cass v. Waterhouse*, Prec. Cha. 29.

⁴ *Cooke v. Tombs*, 2 Anst. 430.

⁵ *Rose v. Cunynghame*, 11 Ves. 50.

term, there must be a special acceptance in writing, supplying that term, in order to take the case out of the statute.¹

38. With regard to the mode of relying upon the Statute of Frauds, as a defence to a suit upon a parol contract relating to lands; or the rules of pleading connected with such defence; it is held, in general, that a parol contract for the sale of lands is only *voidable*.² Hence, although in a suit for specific performance of such agreement, if the defendant, in his answer, admit the agreement, he may still set up the statute as a defence;³ yet, if the defendant in his answer admits the contract, without insisting on the statute, the court will decree a specific performance.⁴

39. The statute need not be pleaded; more especially where the answer denies the agreement.⁵ So, if a defendant denies any agreement, the complainant must prove a valid one, except in case of *part performance*.⁶ So, if a bill be brought for specific performance of a parol contract for the conveyance of land, although the defendant does not rely upon the plea of the statute, yet, if he denies the contract as stated in the bill, and insists that the real contract was a different one, the court will not receive parol evidence in support of the plaintiff's claim.⁷

40. But the bill having charged, that the defendant had written letters to the attorney who was to prepare the conveyance, in which the agreement was admitted, he must answer to that fact.⁸

41. Where a bill seeks specific performance of a contract, which appears from the bill itself to be within the statute, this is ground of demurrer.⁹ So, when fraud is charged in the bill, it need not be answered, if the bill, admitting the fraud, presents no ground for relief. Hence, a

¹ *Boys v. Ayerst*, 6 Madd. 316.

² *Gillespie v. Battle*, 15 Ala. 276.

³ *Thompson v. Tod*, 1 Pet. C. C. 388.

⁴ *Hollingshead v. McKenzie*, 8 Geo. 457; *Newton v. Swazey*, 8 N. H. 9; *Jervis v. Smith*, 1 Hoffm. Ch. 470.

⁵ *Poag v. Sandifer*, 5 Rich. Eq. 170. See *Tufts v. Tufts*, 3 W. & M. 456;

Rowton v. Rowton, 1 Hen. & M. 92; *Givens v. Calder*, 2 Desaus. 171.

⁶ *Jervis v. Smith*, 1 Hoffm. Ch. R. 470; *Reynolds v. Dunkirk, &c.*, 17 Barb. 613; *Hall v. Hall*, 1 Gill, 383.

⁷ *Allen v. Chambers*, 4 Ired. 125.

⁸ *Cooke v. Tombs*, 2 Austr. 420.

⁹ *Chambers v. Lecompte*, 9 Mis. 566.

bill to enforce a parol sale of land, charging the defendant with fraudulently refusing to reduce the agreement to writing, though it was part of the contract that it should be so reduced, may be demurred to, without an answer to the charge of fraud.¹

42. Bill for specific performance of a parol agreement respecting lands. The defendant pleaded the Statute of Frauds, and also answered. In his answer he admitted the parol agreement, as stated in the bill; and that he had taken possession of and held the land under the agreement. Held, the answer took the case out of the statute.²

43. Bill for specific performance of a verbal agreement relating to the purchase of land. The defendant relied on the Statute of Frauds, and also denied any such agreement. Upon this denial he was indicted for perjury. Held, the denial of an agreement not binding on the parties was immaterial and irrelevant, and the defendant was entitled to his acquittal.³

44. A parol contract for lands, alleged to have been made by the ancestor, will not be specifically enforced against infant heirs, although their guardians do not insist upon the statute.⁴

¹ *Box v. Stanford*, 13 Smedes & Marsh. 93.

² *Smith v. Brailsford*, 1 Desaus. 350.

³ *Rex v. Dunston, Ry. & Mood*, 109.

⁴ *Grant v. Craigmiles*, 1 Bibb. 203.

CHAPTER VIII.

PAROL LICENSE.

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|---|---|
| 1. Part-performance and license.
2. Nature of a license.
8. <i>Implied</i> license.
9. Distinction between a <i>license</i> , and a <i>lease</i> , or an <i>easement</i> . | 19. A license creates a <i>personal</i> right; by whom, and at what time, it is to be executed: who are bound by it.
27. Whether and how far a license is <i>revocable</i> . |
|---|---|

1. IN the next chapter, we shall have occasion to consider the effect, upon a verbal contract for the sale and purchase of lands, of a *part-performance* of such contract, as operating to take it out of the Statute of Frauds. Somewhat analogous to this part of the general subject, is a verbal *license* to enter upon land, for particular specified purposes, not constituting or accompanied by a transfer of title to the land itself. Inasmuch as a license derives much of its legal effect and validity from the execution of it, the two topics referred to may naturally be considered in immediate connection with each other.

2. A license, as has been already remarked, does not *pass an estate*, but merely confers a certain *right or privilege*, to be used upon the land of another. It is a mere authority to enter upon the land of another, and do an act, or series of acts, without having any interest in the land; founded in personal confidence, not assignable, and valid, though not in writing.¹ Thus, the grant of a *license to flow* passes no property, but is a mere *remitter* of damages.² So a license will not sustain an action of trespass *qu. cl.*³ So, a plea

¹ Mumford v. Whitney, 15 Wend. 380; Folsom v. Moore, 1 Appl. 252; Taylor v. Waters, 7 Taunt. 374; Liggins v. Inge, 5 Moo. & P. 712; Hazelton v. Putnam, 3 Chand. 117.

² Clinton v. McKenzic, 5 Strobb. 36. See Smith v. Simons, 1 Root, 318; Woodward v. Seeley, 11 Illin. 157.

³ Houghtailing v. Houghtailing, 5 Barb. 379; Den v. Baldwin, 1 Zab. 390.

of license does not raise the question of title.¹ So a license not only does not create any title to the land, but also disproves any claim arising from adverse possession.²

3. Thus, a parol agreement for liberty to stack coals upon land, for seven years, has been held valid.³ So, a parol license to build and maintain a bridge on another's land is valid.⁴ So parol authority may be given to a grantor to enter upon the land and remove property, being a mere license.⁵ So, a parol license is valid, to enter on land, and lay down aqueduct logs, for the purpose of conveying water from a spring to adjoining land, with liberty to enter from time to time for examination and repairs.⁶

4. Action for building and continuing a railroad on a street in front of the plaintiff's house, so as to obstruct his right of ingress and egress. Held, the company might set up a parol license from the plaintiff to build the road, as a bar to all damages sustained while the license remained unrevoked.⁷

5. The owner of wild land agreed with another person to go and clear a part of it, fence, and help the latter to build a house, reserving to the former the use of the timber, except what was needed for "house, rails, and firewood." Held, a mere license to occupy the land, giving no right to dispose of any timber cut in clearing it.⁸

6. License from the lord of a manor to erect a cottage, rendering an annual rent of 10*s.* 6*d.* as a quit-rent; also to enclose a piece of ground for a garden to the cottage; both being parts of the waste. The licensee built a cottage, and resided in it a year and a half. Held, not to confer a settlement, not being a grant of any interest in land.⁹

7. A son, having agreed to purchase a piece of land for 65*l.*, applied to his father, who consented to advance 20*l.*

¹ *Wheeler v. Rowell*, 7 N. H. 515.

² *Luce v. Cooley*, 24 Wend. 451.

³ *Wood v. Lake*, Say. 3.

⁴ *Ameriscoggin, &c. v. Bragg*, 11 N. H. 102.

⁵ *Parsons v. Camp*, 11 Conn. 25.

⁶ *Sampson v. Burnside*, 13 N. H. 264.

⁷ *Miller v. Auburn, &c.* 6 Hill, 6.

⁸ *Caller v. Hilty*, 2 Harr. (Penn.) 286.

⁹ *Rex v. Inhabitants of Horndon*, 4 Mau. & Selw. 562.

left to his wife, on condition that a house should be built by the son on the land, which the father and mother were to have for their lives, and the life of the survivor, and which was afterwards to go to the son, but the father and mother were not to sell or dispose of it, nor to take any other family into the house. This agreement was only by parol. Afterwards the father advanced the 20 $\frac{1}{2}$ l., the son completed the purchase, the land was conveyed to him in fee, and he built a house, of which the father and mother took possession, with his consent, and lived in it for three years, without paying any rent, when the father died, and the mother continued in possession. Held, the father did not gain a settlement by the residence on the land, nor was the mother entitled to reside on it irremovably.¹

8. A license, or a right equivalent to that created by a license, may, under some circumstances, be *implied*. Thus, it is held in Maine, that the right to *flow*, in order to raise water sufficient to carry a mill, subject to the claim for damages, is given, by necessary implication, in the statute regulating mills, and therefore needs not to be proved by writing, under the Statute of Frauds.² (*a*) So, there is an implied license to enter a shop for the purpose of making a purchase, or the house of a friend, to pay a visit.³ So, the construction of a wharf, or dock, on the margin of a navigable stream, is an implied license to all persons engaged in the navigation of its waters, to use the wharf, when otherwise unoccupied, for the purpose of mooring or making fast their vessels; and, when once acted on, this license cannot be recalled, without giving the owner of the vessel sufficient time to provide for her safety in some other manner. Held, therefore, that one by whom a vessel was cut loose from her

¹ *Rex v. Inhabitants of Standon*, 2 Mau. & Selw. 461.

² *Clement v. Durgin*, 5 Greenl. 9.

³ *Adams v. Freeman*, 12 John. 486.

(*a*) So, the damages occasioned by such flowing may be waived or relinquished by parol.

fastenings, and suffered to drift down the stream, was answerable for the whole amount of injury thus occasioned; and could not justify by showing that the title to the wharf was vested in himself, and that the vessel had been moored there without his knowledge or consent.¹ So, building a plank wall near the boundary line of land, which the plaintiff was entitled to have left open with a view to the enjoyment of light and air; was held a waiver of that right, and debarred him from objecting to the building erected by the defendant, although so placed as to obstruct the view from a window subsequently opened in the wall.² But where, by an indenture between the town of Boston and a mill-dam corporation, the latter granted to the former a certain proportion of a tract of land covered with water, "excepting the mill-creek, and such other canals as may be agreed to be kept open for the passage of boats;" and by a subsequent indenture between the same parties, it was agreed that the town might put a covering over part of the creek or canal, "provided only, that no interruption or impediment shall be made or permitted below said covering to boats on passing through or into said canal;" held, these provisions did not constitute a license to the abutters to navigate the creek.³ So, also, the creek being kept open for boats, held, although there was an implied public license to navigate it, this was not such a perpetual license as could be pleaded as a grant, or a dedication to the public; and that no individual could acquire a prescriptive right, by the use of it while thus open.⁴

9. It is obvious, from the general nature of the title above referred to, as well as from the cases cited to illustrate it, that, although purporting to involve no interest in the land, and therefore not falling within the provisions of the Statute of Frauds; it is still a species of *ownership*, and, if extended to the length which the principle of it would seem legitimately to allow, might well go far to defeat the purposes

¹ Heeny v. Heeny, 2 Denio, 625.

³ Baker v. Boston, 12 Pick. 184.

² Moore v. Rawson, 3 B. & C. 332.

⁴ Ibid.

See Liggins v. Inge, 7 Bingham, 682.

of that statute. Hence the following distinction has been adopted, and seems to be as well established as the general rule itself.

10. A license is a mere authority to do a particular act, or series of acts, upon another's land, as *e. g.* to hunt, or cut a certain number of trees. Such licenses merely excuse acts, which would otherwise be trespasses. But a license, which grants an estate, however short, is a *lease*, and requires a deed. So, a permanent right to hold another's land for a particular purpose, and enter at all times without his consent, is an *easement*, and requires an agreement in writing.¹

11. So it is held, that although an easement, arising either from grant or prescription, may be extinguished, renounced, or modified by a parol license from the owner of the *dominant tenement*, executed by the owner of the *servient tenement*; yet, as an easement cannot be created but by deed or prescription, a parol license, which would create an easement, if given by deed, may be revoked, even after execution.² (a)

12. The owner of a mill privilege, under whom the plaintiffs claimed, gave the owner of lands flowed thereby, under whom the defendants claimed, an oral license to erect a dam on his land, and also to dig a ditch across the land of the licensor to drain the water from part of the licensee's land; which was accordingly done. Held, the license to dig the ditch might be revoked, even after twenty years, but not the license to build the dam; and, the licensor having assumed to revoke the whole license, and, after notice, made an incision in the dam; the licensee was justified in making a

¹ Cook *v.* Stearns, 11 Mass. 537; Folsom *v.* Moore, 1 Appl. 252; Prince *v.* Case, 10 Conn. 375; Mumford *v.* Whitney, 15 Wend. 380; Seidensparger *v.* Spear, 17 Maine, 123; Stevens *v.* Stevens, 11 Met. 251; 3 Kent, 452; Claffin *v.* Carpenter, 4 Met. 583.

² Morse *v.* Copeland, 2 Gray, 302.

(a) "Generally, if not always, a license which, when executed, extinguishes or modifies an easement, is, from the nature of the case, a license to do acts on the servient tenement—the tenement of the licensee." Per Metcalf, J. Morse *v.* Copeland, 2 Gray, 305.

ditch on his own land, to draw off the water thus thrown upon it, though he thereby diverted the water from the licensor's mill-pond.¹

13. So, an agreement, that a party may abut and erect a dam upon the lands of another, and maintain it so long as there shall be employment for the water-power, is void, for the power, being not a mere license, but a transfer of an interest in lands, in order to be valid, must be in writing.²

14. The attorney of a lessor wrote to the lessee: "Mr. (the lessor) has no objection to your leaving the fixtures on the premises, and making the best terms with the incoming tenant." Held, if such letter gave any license, it was one coupled with an interest in land, and required a sealed instrument; and did not therefore give the lessee a right of action against the incoming tenant, for refusing either to purchase the fixtures or allow the lessee to enter and remove them.³

15. The defendant gave a parol license to the plaintiff to construct a drain through the defendant's yard, and use it as a means of escape for foul and waste water from the defendant's premises. After the license had been acted upon and executed, and the drain constructed, he revoked the license and stopped up the drain. Held, he was not liable to an action for so doing, the right claimed by the plaintiff being an easement, which lay in grant, and could not be created by parol.⁴

16. A sealed instrument of the following tenor: "I hereby authorize R. to open and continue open, a road through my field, beginning at, &c., as also to build, keep in repair, and use a bridge over the branch in the field on which the said road will pass, said road and bridge being intended as well for the public use, as the use of R.; and to continue until R. and myself shall agree it shall be shut up or altered;" is a grant of an incorporeal hereditament, a right of way *de novo*,

¹ Morse v. Copeland, 2 Gray, 302.

³ Ruffey v. Henderson, 8 Eng. Law

² Mumford v. Whitney, 15 Wend.

& Eq. 305.

380.

⁴ Hewlins v. Shippam, 5 B. & C. 221.

which will endure until both parties agree upon its discontinuance, and must be legally acknowledged and recorded.¹

17. The same distinction has been applied to *public or legislative grants*. Thus, the proprietor of a wharf in a harbor was authorized by statute to extend it into the channel to the line of the harbor. Before any such extension, a company was incorporated, with authority to locate and construct a railroad across and over the flats between the wharf and the line of the harbor. Held, the former act was a *grant*, not a mere license, revocable, and revoked by the latter.² So, a legislative repealable grant to a corporation, of the right to lay gas-pipes in the highways, is not a mere revocable license, but an easement.³

18. A license is also to be distinguished from a *lease*, as well as an easement, which latter is the chief point of distinction in the cases already cited. Thus, A., under a license from B., the owner of land through which flowed a water-course, erected a mill thereon, and ever afterward held and occupied such mill as owner; but it did not appear that there was any consideration for the license, or that it was to continue for any certain time, or that there was any agreement as to the nature of the occupation, or any mutual stipulations. A. brings an action against C., the owner of a mill below, for setting back the water upon his mill, by means of a dam erected by C. Held, the license did not constitute a lease, nor create any privity of contract between A. and B.⁴ So, an unsealed lease provided as follows: "All the hedges, trees, thorn-bushes, fences, with lop and top, are reserved to the landlord." The landlord having entered the close, and drawn the trees, when cut, over it, the tenant brings an action against him. Held, the above agreement might be shown under a plea of leave and license.⁵ So, an

¹ Hays v. Richardson, 1 Gill & J. 366.

² Fitchburg, &c. v. Boston, &c. 3 Cush. 58.

³ Providence, &c. v. Thurber, 2 R. I. 15.

⁴ Branch v. Doane, 17 Conn. 402.

⁵ Hewitt v. Isham, 7 Eng. Law & Eq. 595.

executory contract of purchase, with leave to the vendee to enter and occupy till default in payment, without any fixed period or compensation, is a license ; not a lease, easement, or permanent interest in land. Nor does it create the relation of landlord and tenant. Nor is the purchaser a wrongdoer till default or demand of possession.¹ So, a deed, invalid as a conveyance for want of a witness, may be good as a license.²

19. It has already been stated, that a license is a *personal* authority. Hence, the privilege which it creates is not transmissible, by the act of the party or of law, by assignment, descent, or devise, like a legal estate, but is restricted to the original party himself. (a) Thus, an agreement was made for sale of land, the purchaser not to cut or allow to be cut any timber, without written consent of the vendor. The defendant, claiming under the vendee, cut timber, and the vendor brings trover against him. Held, the defendant could not set up in defence a parol license to cut, from the plaintiff to the purchaser.³

20. License (under seal) to build a mill and dam, at any point in the course of a stream, which the grantee should think proper. Held, this license could be executed only by the party to whom it was given ; and, if not executed in his lifetime, would confer no authority or interest upon his heirs or those claiming under him.⁴

21. Trespass against a commoner, for pulling down a house built on the common, to which he pleaded his right of common as a justification. Replication, a license to build

¹ Dolittle v. Eddy, 7 Barb. 74.

⁴ Vandenburg v. Van Bergen, 13

² Sullivan v. Franklin, &c. 3 Ohio, 89. Johns. 212. See Co. Lit. 145 a ; Hey-

³ Pierrepont v. Bernard, 5 Barb. 364. ward's case, 2 Rep. 36 a, b.

(a) A distinction has been made, between a license of *profit* or *profit a prendre*, and a *personal license of pleasure* ; the former of which may be exercised by an agent. Winckham v. Hawker, 7 Mee. & W. 63. A license to search for, raise and carry away metals and convert them to the party's own use, has been held assignable. Muskett v. Hill, 5 Bing. N. 694.

the house, given by the party, from whom the estate to which the common was appurtenant came to the defendant. Held, the distinction between the abandonment and acquisition of the right in an easement, which was contended for in support of the replication, applied, if at all, only as between the original parties, and not as against the defendant, a subsequent grantee.¹

22. So, a parol license from A. to B., to take trees from A.'s land so long as B. pleases, expires with the death of A.² But where the defendant gave a written license to A. and B. to take logs from the plaintiff's land, and, after the death of A., B., under his license, and without intimation from the defendant of a revocation, took the logs; held, the license was not revoked by the death of A., but the defendant was liable in trespass.³

23. Upon the same principle, the *time of executing* a license is not to be extended beyond its strict terms. Thus, a general, parol license, to cut and carry away wood growing upon land, if available at all, must be acted upon within reasonable time; and applies only to the wood as it is substantially at the time of giving the license. What is a reasonable time, the facts being agreed, is for the Court. Such license does not continue fifteen years, not being acted upon.⁴

24. Devise to A.'s children, of "a plantation to come into their possession, or into the hands of the executors for their benefit, at the testator's death, providing that A. have the privilege of living on the place with his children during his life." Held, A. did not take a life-estate, but his title was under a license, and of A.'s children only those took who were *in esse* at the testator's death.⁵

25. Upon the same principle, a *conveyance* by the owner of the land puts an end to a license for an easement; and

¹ Perry v. Fitzhugh, 8 Qu. B. 757.

² Putney v. Day, 6 N. H. 430.

³ Chandler v. Spear, 22 Verm. 388.

⁴ Gilmore v. Wilbur, 12 Pick. 120.

⁵ Calhoun v. Jester, 1 Jones, 474.

the licensee, afterwards entering, though without notice of the deed, is liable in trespass to the purchaser.¹ Thus, a license to erect a house on one's land, for the use of the builder, does not affect the title of a purchaser of the land, without notice; and such notice is not to be inferred from occupation of the house.² (a)

26. A., the owner of land, gave B. liberty to erect a dwelling house for his use thereon. B. erected it accordingly, and lived therein eleven years, when he died; having executed a deed of such house to the plaintiff, his son. A. had previously conveyed the land to the defendant, by deeds containing no notice or exception of such license. The defendant brought ejectment for the land and house against the party in possession, recovered judgment, and, by virtue of an execution, was put in possession, and so continued more than a year, when he took down the house, thereby destroying it as such, but did not take away the materials. The plaintiff then brings an action of trespass. Held, the defendant was not liable.³

27. In regard to the *revocation* of licenses, a very fruitful subject of discussion has been, whether a license can be revoked, *after it has been executed*; and, if so, whether only upon the terms of a reasonable indemnity to the party, who may have acted and incurred expense under and upon the faith of such license.

28. The weight of authority upon this subject is, that, where title to real estate is not involved, a license is not revocable, after it has been executed, or rather executed in

¹ Wallis v. Harrison, 4 M. & W. 538.

² Prince v. Case, 10 Conn. 375.

³ Ibid.

(a) Such license is also a personal privilege, not extending to heirs or assigns; and, whether countermandable or not during the life of the builder, expires at his death. Whether any notice to remove the building, after his death, be necessary or not, a subsequent recovery in an action of ejectment, by the grantee of the land, with possession taken and held for more than a year, is sufficient notice.

part, to the injury of the party who has acted under it. Several cases have been already referred to in the present chapter, which illustrate this point. The following may be added, as turning more directly upon the question of revocation.

29. Oral agreement of the plaintiff with the defendant, that the latter might cut trees on land of the former, peel them, and take the bark. The defendant having cut and peeled the trees, the plaintiff forbids his entering to take the bark, and brings an action of trespass for such entry. Held, the action did not lie, because the bark, when peeled, became the property of the defendant, and was on the plaintiff's land by his consent, and the defendant therefore had a right to remove it. Had the plaintiff done so, he would have been liable in trover.¹

30. Sale of mulberry trees in a nursery, raised to be sold and transplanted, with a license to enter and remove them. Held, the sale passed no interest in the land within the statute; that the license was revocable, but, if revoked in violation of the agreement to sell the trees, and give liberty to enter and remove them, to the prejudice of the purchaser, the vendor would be liable for damages; the contract binding him, either to remove the trees himself, or permit the purchaser to do it.²

31. So in an old case it is held, that a license, coupled with the grant of an interest, is irrevocable, so far as it is essentially necessary to the enjoyment of the grant. Thus, if one permit another to cut down a tree on the land of the former, and to come on the land, at any subsequent period, for the purpose of removing it, this is said to amount to the grant of an absolute interest in the tree, as soon as the permission to cut it has been executed; and the license is irrevocable, so far as essential to the possession and enjoyment of the grant.³ And, in another case, it is said, "A license under

¹ *Nettleton v. Sikes*, 8 Met. 34.

² *Whitmarsh v. Walker*, 1 Met. 313.

³ *Thomas v. Sorell*, Vaughan, 35.

seal (provided it be a mere license) is as revocable as a license by parol; and, on the other hand, a license by parol, coupled with a grant, is as irrevocable as a license by deed; provided only that the grant is of a nature capable of being made by parol.”¹

32. But the class of cases, in connection with which these questions have chiefly arisen, has been that of solid and permanent erections, constructions, or excavations—such as buildings, dams, sluiceways, &c.—by the party licensed, upon the land of the party licensing, necessarily involving time, labor, and expense, and the chief value of which consists in the *continuing* right to hold and use them. It is difficult to deduce from the authorities any well-defined rule upon these points of discussion. They involve, in its most practical application, the very nice and shadowy distinction already adverted to, between a license and an easement; or rather, if the doctrine were adopted without qualification, that an executed license is irrevocable, it is quite obvious that the distinction in question would cease to exist; because the class of works above referred to are, in the fullest sense of the word, *easements*, and, in a very large proportion of cases, no question arises in regard to them, until after they have been completed and put in actual operation. Accordingly, in a leading case upon this subject, already cited,² which was an action of trespass *qu. claus.* for entering the close of the plaintiffs, and digging up the soil; the defendant having pleaded a license to erect and maintain a dam, and an entry for the purpose of repairing it; the plea was held bad on demurrer, as being in effect the claim of an easement. The case would of course have been still stronger for the plaintiffs, had they relied upon a revocation of the license by way of replication. But the remarks of the court present, in a strong light, the general difficulties of giving to a verbal license the permanent effect contended for by the de-

¹ Per Alderson, B. *Wood v. Lead-bitter*, 13 Mec. & W. 838.

² *Cook v. Stearns*, 11 Mass. 533.

defendant. "Licenses to do a particular act," says Parker, C. J., "do not in any degree touch upon the policy of the law, which requires that bargains respecting the title or interest in real estate, shall be by deed, or in writing. But a permanent right to hold another's land for a particular purpose, and to enter upon it at all times, without his consent, is an important interest which ought not to pass without writing, and is the very object provided for by our statute. If the defendant had a license from the former owners of the plaintiff's close, to make the bank, dam, and canal in their land, this extended only to the act done, so as to save him from their action of trespass for that particular act; but it did not carry with it an authority at any future time to enter upon the land. As to so much of the license as was not executed, it was countermandable; and transferring the land to another, or even leasing it without any reservation, would, of itself, be a countermand. If the defendant's plea were held to be a bar to the action, all the mischiefs and uncertainties which the legislature intended to avoid by requiring such bargains to be put in writing, would be revived; and purchasers of estates would be without the means of knowing whether incumbrances existed or not, on the land which they purchased."

33. The same doctrine has been affirmed by many other decisions. Thus, in a leading English case, where the defendant, after sanctioning, and actually aiding in the construction of a sluice by the plaintiff, which traversed the defendant's land, stopped up the sluice; held, he was not liable to an action.¹

34. Trespass for assault and false imprisonment. Plea, that at the time of the supposed trespass, the plaintiff was in a close of Lord E., and the plaintiff, as the servant of Lord E., and at his command, *molliter manus imposuit* on the

¹ Fentiman v. Smith, 4 E. 107; Rugles v. Lesure, 4 Pick. 187; Stevens v. Stevens, 11 Met. 251; Coburn, 1 Cow. 568; Mumford v. Whitney, 15

Wend. 380; Houghtailing v. Houghtailing, 5 Barb. 379; Hays v. Richardson, 1 Gill & J. 366; Den v. Baldwin, 1 Zab. 390.

plaintiff, to remove him from the said close, which was the trespass complained of. Replication, that the plaintiff was in the close by the leave and license of Lord E., which was traversed by the rejoinder. The evidence was, that Lord E. was the steward of the Doncaster races; that tickets of admission to the grand stand were issued, with his sanction, and sold for a guinea each, entitling the holders to come into the stand and the inclosure round it, during the races; that the defendant, by order of Lord E., desired him to leave it, and on his refusing to do so, the defendant, after a reasonable time, put him out, using no unnecessary violence, but not returning the guinea. Held, the jury were properly directed to find for the defendant; that a right to come and remain for a certain time on the land of another can be granted only by deed; and a parol license to do so, though money be paid for it, is revocable at any time, and without paying back the money.¹

35. Bill in equity for the abatement of a nuisance, alleged to be a mill-dam on the plaintiff's land. It appeared that A. gave to the defendant a verbal license to erect and continue a mill-dam on A.'s land, and to dig a ditch through the land, for conveying water to a mill which the defendant was about to erect on his own land. The defendant made the dam, dug the ditch, and afterwards erected the mill, and continued them during A.'s life. After granting the license, A. conveyed his land to the plaintiff, without reservation. The defendant continued the dam and ditch after A.'s death, for the purpose of working the mill. The plaintiff, having requested him to remove the dam, and fill up the ditch, upon his refusal, attempted to remove the dam, and tore down part of it; whereupon the defendant interfered by force, prevented further proceedings, and repaired the dam. The plaintiff then brings this bill, and a jury, upon an issue submitted to them, found the dam to be a nuisance. Held, the plaintiff was entitled to a decree for abatement, and a per-

¹ Wood v. Leadbitter, 13 Mees. & Welsb. 338.

petual injunction ; that the defendant was not liable for any thing done before revocation of the license, and therefore not chargeable with the expenses of removing the old dam ; but that he was liable for building a new dam or repairing the old one, after such revocation, and for the expense of abating the new dam.¹

36. In 1769, a parish erected a meeting-house on land granted them by the town, and some of the parishioners erected sheds on the land. In 1801, other sheds were built by authority of the parish. In 1815, the sheds were blown down, and the parish, proposing to erect a new house of worship in another place, voted not to authorize the reërection of the sheds in the former site, and appointed the defendants to be a committee to regulate the place and mode of erecting new sheds ; and the former owners erected new sheds, under direction of the committee, on other parts of the land. The plaintiff, one of the old proprietors, was notified by the defendants to remove his shed, and, upon his failing to do so, the defendants removed it, and the plaintiff brings an action of trespass against them for so doing. Held, the plaintiff was not a tenant at sufferance, the relation of landlord and tenant never having existed between the parties, but the parish merely having permitted the parishioners to place their sheds on the ground as a matter of accommodation and favor ; that no right or title to, or easement in, the land was thus acquired ; but that the parish might at pleasure revoke the license.²

37. But, on the other hand, it has been held in New Hampshire, in case of a parol license to erect a dam, for the benefit of both parties, that, after execution, it could not be revoked, without a tender of the expense of erecting it.³ So it has been held, that a license to build and maintain a bridge on another's land was either irrevocable, or else could not be revoked, except on payment of all expense and damage. The court

¹ *Stevens v. Stevens*, 11 Met. 251.

² *Bachelder v. Wakefield*, 8 Cush. 243.

³ *Woodbury v. Parshley*, 7 N. H.

237.

say, "A license to an individual, to do an act beneficial to him, but requiring an expenditure upon another's land, is held not to be revocable after it has been once acted upon. Such a license is a direct encouragement to expend money; and it is said it would be against conscience to revoke it, as soon as the expenditure begins to be beneficial. A license to erect a bridge for the taking of toll, is clearly distinguished from a mere easement of passing and repassing; and we think when it is once executed, it is either irrevocable while the bridge continues, or if revocable at all, can only be on full compensation for all expenditures made, and damage occasioned, by such revocation."¹

38. So it has been held in Maine, that if there be a parol agreement for a right of way, or other interest in land, and any acts be done in pursuance thereof, which are prejudicial to the party performing them, and are in part-execution of the contract, the agreement is valid, notwithstanding the Statute of Frauds. Therefore, the owner of land having, for valuable consideration, given license to another by parol to build a bridge on his land, an action of trespass will lie against the former for taking away the bridge, without the consent of the latter.²

39. Trespass *qu. claus.* Goods upon the plaintiff's land were sold to the defendant; by the conditions of sale, to which the plaintiff was a party, the buyer being allowed to enter and take the goods. The defendant, having entered to take them, justifies under a plea of leave and license, to which the plaintiff replies *de injuria*. Held, the defendant was entitled to a verdict, though the plaintiff had, between the sale and the entry, locked the gates, and forbidden the defendant to enter, and defendant had broken down the gates, and entered to take the goods, the plaintiff, after the sale, not having power to revoke the license.³

¹ *Ameriscoggin, &c. v. Bragg*, 11 N. H. 102.

² *Ricker v. Kelly*, 1 Greenl. 117.

³ *Wood v. Manley*, 11 Adol. & Ellis, 34.

40. So, a parol license, to put a sky-light over the defendant's area, (which impeded the light and air from coming to the plaintiff's dwelling-house through a window,) cannot be recalled at pleasure, after it has been executed at the defendant's expense; at least, not without tendering the expenses he had been put to; and therefore no action lies as for a private nuisance, in stopping the light and air, &c., and communicating a stench from the defendant's premises to the plaintiff's house, by means of such sky-light.¹

41. The remarks quoted above (§ 37,) and similar ones in other cases, seem to pass beyond the technical doctrine of *license*, to the distinct, though analogous title by *estoppel*; which, however, if indiscriminately applied to all cases of verbal acquiescence in the permanent use of real property, would at once do away with the strict rules relating to the mode of creating an easement. There is another class of cases, somewhat favoring this view of a license, according to which, one party erecting a building upon the land of another, by permission of the latter, owns the building as personal property.² And, moreover, the general doctrine, to be considered in the next chapter, that in equity part-performance of a parol contract renders it valid; if carried out in courts of law, would seem to favor the theory that a license becomes irrevocable by its execution. Still, however, as already stated, the weight of authority, and the only doctrine consistent with the security of title to real estate, is, that no permanent ownership can be thus created.

¹ Winter v. Brockwell, 8 East, 308.

² Russell v. Richards, 2 Fairf. 371; Woodbury, 15 Pick. 156; Marcey v. Darling, 8 Pick. 283; Wood v. Hewett, 8 Q. B. 913; White's, &c., 10 Barr, 252.

Ashmun v. Williams, 8 Pick. 402; Wells v. Bannister, 4 Mass. 514; Curtiss v. Hoyt, 19 Conn. 154; Rogers v.

CHAPTER IX.

PART-PERFORMANCE.

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| 1. License and part-performance.
2. Part-performance, <i>at law</i> .
5. Entire performance, <i>in Equity</i> .
6. Part-performance in Equity.
7. Who may avail himself of part-performance.
8-20. What acts are sufficient.
10. Proof of the terms of a parol agreement. | 11. Decided cases.
15. Parol <i>partition</i> .
17. The effect of part-performance is founded on <i>fraud</i> .
18. Effect of <i>payment</i> .
24. Doctrine in the United States.
25. Compensation for expenditures, &c. |
|---|---|

1. HAVING in the last chapter considered that important exception or qualification to the Statute of Frauds, as applied to the sale and purchase of lands, which grows out of what is termed in law *a license*, we now proceed to speak of another equally important, arising from *part-performance* of a parol agreement. We have already adverted to the obvious analogy between these two topics, (ch. 8.)

2. It has been sometimes held, that the same construction of the Statute of Frauds is to prevail at law and in equity, and therefore that part-performance of a parol agreement takes it out of the statute, alike in both tribunals.¹

3. Action on the case, for breach of an agreement to sell and convey to the plaintiff, in fee-simple, a tract of land. The plaintiff offered parol evidence of the agreement, payment of the consideration, the defendant's subsequent acknowledgment of the sale and payment; and of the defendant's refusal to execute a conveyance. Held, the agreement having been executed by one of the parties, the action could be maintained.² So, the statute does not avoid a note for

¹ Brodie *v.* St. Paul, 1 Ves. 326.

² Bell *v.* Andrews, 4 Dall. 152.

the purchase-money of land sold by parol, but of which the purchaser has taken possession.¹ So, a grantor may maintain an action for a part of the consideration expressed in the deed to have been paid, but which by mistake was not paid. Parker, C. J., says : " It is not a case within the Statute of Frauds, because it is not a contract for the sale of lands. That contract was executed and finished by the deed. This is only a demand for money arising out of that contract." ²

4. But the prevailing rule is, that the doctrine of equity, by which payment of part of the purchase-money on a parol contract, and taking possession of the premises under the contract, take the case out of the statute, does not prevail in courts of law.³ So, it seems, that at law, nothing short of a full and complete performance, by one party, of an agreement within the statute, will take it out of the operation of the statute. As where nothing remains but to pay over the money received, in which case the statute furnishes no defence.⁴ Thus, at law, a parol contract for the sale of land is void, notwithstanding possession and improvements by the purchaser ; and money paid thereon may be recovered back from the vendor or his heirs, they being unable or failing to perform the contract.⁵ So, a promise by a father to give his son a tract of land by his will, followed by expenditure in improvements, not, however, in execution of the contract, or at the father's request, is without consideration, and cannot be enforced.⁶ So, a parol promise to give real estate, possession taken by virtue of such promise, and valuable and permanent improvements made with the consent of the owner, furnish no ground for a decree enforcing the promise.⁷ So, *assumpsit* does not lie, upon an agreement of the de-

¹ *Gillespie v. Battle*, 15 Ala. 276.

² *Wilkinson v. Scott*, 17 Mass. 249, 258.

³ *Barickman v. Kuykendall*, 6 Blackf. 21.

⁴ *Eaton v. Whitaker*, 18 Conn. 222 ; *Linscott v. McIntire*, 15 Maine, 201.

⁵ *Sailors v. Gambriel*, 1 Cart. 88 ; *Barickman v. Kuykendall*, 6 Blackf. 21.

⁶ *McClure v. McClure*, 1 Barr, 374, 379.

⁷ *Ridley v. McNairy*, 2 Humph. 174.

fendant with the plaintiff, to convey to him land on one side of a highway, in consideration of the plaintiff's consenting to the taking of his own land on the other side of the highway, without any claim for damages; although the plaintiff has performed his part of the contract. Dewey, J., says: "Such a doctrine (that of part-performance,) has, under proper limitations, often been recognized in the Courts of Equity, where it was required in furtherance of justice, and to prevent manifest fraud; but it has obtained no permanent sanction as a principle of jurisprudence in the courts of law. Several of the cases above cited will be found to have presented strong equitable claims for the interposition of the Court, and to have been cases where the defendants had received benefit, to a very considerable extent, from the execution of the contract by the plaintiffs; but the Court nevertheless maintained the doctrine that damages could not be given at law for the non-performance of a contract to convey lands, which was not in writing; and that it would not avail, though a part-performance was shown, even if it appeared that the party was remediless, if he could not resort to his action.¹

5. It will be presently seen, that a different rule prevails in equity, even with reference to *part* performance of a verbal contract. *A fortiori*, it is held, that in equity, *a full, substantial performance on both sides* will take the case out of the statute, notwithstanding any legal defect or informality. Thus, on a parol agreement made sixty or seventy years ago, which had been fully performed on both sides, except only the complete execution of a deed, a specific performance was decreed.² So, as has been seen, (ch. 1,) where a written agreement for the purchase of an estate has been executed, the purchaser has the estate in equity, and it will pass by his will, notwithstanding a subsequent conveyance of the legal estate.³ So, if a parol agreement has been executed on one part, and

¹ Adams v. Townsend, 1 Met. 483, 485.

² Somerville v. Trueman, 4 Harr. & McHen. 252.

³ Rose v. Cunynghame, 11 Ves. 550.

an enjoyment had accordingly, equity will not destroy or avoid it.¹ The Statute of Frauds in such case is no defence.²

6. The same general principle has been still further extended, so as to apply not merely to a complete, though informal performance, but also to a mere part-performance; and the prevailing rule in Courts of Equity is, that, although a contract for the sale and purchase of lands is void or voidable, under the Statute of Frauds, for want of a writing signed by the party to be charged, yet, where the purchaser takes possession in pursuance of such agreement, and with the vendor's assent, the Court will decree an execution of the contract; more especially where he has made improvements on the land occupied without interruption, and where the vendor has often recognized the sale, and the purchase-money has been paid.³ (a) The Statute of Frauds was designed to exclude oral evidence of the agreement of sale; not oral evidence of the acts of part-performance, or things done in execution of the agreement.⁴ (b) And part-performance has no other effect, except that the plaintiff is thereby let in to prove the agreement *aliunde*, where it is not con-

¹ Lockey v. Lockey, Prec. Cha. 518.

² Aylesford's case, 2 Stra. 783; Pawle v. Gunn, 4 Bing. N. 445.

³ Clerk v. Wright, 1 Atk. 12; Gunter v. Halsey, Ambl. 586; Newton v. Swazey, 8 N. Hamp. 9, 13; Tilton v. Tilton, 9 N. Hamp. 386, 390; Brock v. Cook, 3 Porter, 464; Annan v. Merritt, 13 Conn.

479; Massey v. M'Ilwain, 2 Hill, Ch. 426; Moore v. Beasley, 3 Ham. (Ohio), 294; Wilber v. Pain, 1 Ib. 251; Shirley v. Spencer, 4 Gilm. 583; Keats v. Rec- tor, 1 Ark. 391; Thornton v. Henry, 2 Scam. 216; Wetmore v. White, 2 Caines' Cas. 87.

⁴ Hall v. Hall, 1 Gill, 383.

(a) *A fortiori*, where the whole purchase-money for land was paid, and possession delivered according to a parol contract, the agreement was held not within the statute. Ellis v. Ellis, 1 Dev. Eq. 180; Tibbs v. Barker, 1 Black. 58.

(b) But the mere declarations of the vendee that he had purchased the land, and was the owner, unaccompanied by any act in pursuance of them, want all the essential attributes of part-performance. They are merely parol evidence of the agreement. Anderson v. Chick, 1 Bailey, Eq. 118, 124.



fessed.¹ Thus, when a fair, honest, verbal agreement, for the sale of land, is alleged in a bill and admitted in the answer, or when it appears clearly that such an agreement has been made, and has been performed on one part, or something has been done in pursuance of it, the Court of Chancery will decree a conveyance immediately, or on the proper terms.² And where there are several parcels sold by one parol contract, it suffices if the vendee pays the price and goes into possession of one parcel only.³ Thus, the complainant's bill alleged a contract for the whole of a square of ground, payment of the purchase-money, and possession under the contract. The answer denied the contract as to the whole square, but admitted it as to a part; and also denied payment of the purchase-money, and possession of the whole square. Decreed, that, on payment of the whole purchase-money and interest, the defendant should convey the part of the square.⁴ So, where a parol contract is made for the sale of two parcels of land for a gross price, and the vendor, at the time appointed, conveys one only, and agrees to convey the other presently; and the vendee pays the whole price, and enters into possession of both on receiving the deed; the contract is not merged in such deed, nor varied by the vendee's assent to the delay, as to the other parcel. So, the agreement to give a deed of the latter is not a new parol contract, or a substitute for the first agreement; but the conveyance is a part-performance of the original contract.⁵

7. With regard to the party, who may avail himself of part-performance, it is held, that, after delivery of possession, in pursuance of a parol contract, the vendee, as well as the vendor, may insist on a specific execution of the contract.⁶ But, on the other hand, part-performance is not ground for

¹ *Thompson v. Tod*, 1 Peters, C. C. 388.

² *Simmons v. Hill*, 4 Harr. & M'Hen. 252.

³ *Smith v. Underdunk*, 1 Sandf. 579, 581.

⁴ *Graham v. Yeates*, 6 Harr. & John. 229.

⁵ *Smith v. Underdunk*, 1 Sandf. 579.

⁶ *Pugh v. Good*, 3 W. & S. 56.

holding a party who has done the acts to his own prejudice, unless they are also a prejudice to the plaintiff; because the doctrine of part-performance is founded on fraud.¹ (a)

8. Acts merely *introductory* or *ancillary* will not constitute part-performance, though attended with expense. As, for example, delivery of an abstract, giving directions for conveyances, going to view the estate, fixing upon an appraiser, making valuations, &c.² Thus, where one who had verbally agreed for the purchase of an estate in confidence thereof gave orders for conveyances to be drawn, and went several times to view the estate; held, the Court would not carry such agreement into execution, but the Statute of Frauds might be pleaded to a bill brought for that purpose.³ So, an agreement was made by parol, that, upon the plaintiff's procuring a release from a third person, the defendant would convey. The plaintiff procures the release for a valuable consideration. This is not a part-performance.⁴ So, putting a deed into the hands of a solicitor, to prepare a conveyance, is not a part-performance of a parol agreement, which takes it out of the Statute of Frauds.⁵ So, possession, when set up as an act of part-performance, must be unequivocally, directly, and solely referable to the identical agreement alleged in the bill. It must be either delivered by, or taken with the express or implied consent of, the vendor. If otherwise obtained, it cannot avail. Where no other title to possession,

¹ *Buckmaster v. Harrop*, 7 Ves. 341 ;
Popham v. Eyre, Lofft, 786.

³ *Clerk v. Wright*, 1 Atk. 12.

² *Whitechurch v. Bevis*, 2 Bro. 559 ;

⁴ *O'Reilly v. Thompson*, 2 Cox, 271.

Whaley v. Bagenal, 6 Bro. P. C. 645 ; 400.

⁵ *Redding v. Wilkes*, 3 Bro. C. C.

Whitbread v. Brockhurst, 1 Bro. 412.

(a) It is said, that a parol agreement, which by reason of part-execution binds the party himself, will also bind his representatives in case of his death. 1 Sugd. 174. See *Burkett v. Randall*, 3 Mer. 466. But a strong doubt has been suggested, whether a remainder-man would be bound in consequence of part-performance by the particular tenant; inasmuch as the doctrine proceeds upon the ground of fraud, which is a personal matter. *Shaannon v. Bradstreet*, 1 Sch. & Lef. 52.

and no other origin of it is proved, it is *primâ facie* to be referred to the agreement. But if the vendor's assent to the possession is denied, merely suffering the party to occupy for a few months without turning him out, when the property was of trifling value as to profits, and no improvements were put upon it, is not sufficient.¹

9. If one authorized by the vendor to deliver possession to the vendee takes a lease from the vendee, and enters into actual possession; there is an equitable estate in the lessor, which is bound by a judgment against him.² So, payment of the purchase-money, and continuance in possession by the complainant for several years, who, but for the agreement was a trespasser, were held to take a parol agreement for the sale of lands out of the statute.³ So, a bill in chancery stated, that M. had a life-estate in all the tract of land called Oliver's Neck, the remainder in fee being in C.; that C. sold to M. all his interest in the land; that the purchase-money was paid by M., who retained possession until his death; and that his representatives, the complainants, afterwards retained possession. The testimony did not establish the claim as stated, but proved a contract between C. and M. for one fourth part of the tract; that the purchase-money was paid by M., and possession of the land permitted to be retained by him under the contract. Held, the complainants were entitled to a conveyance of the one fourth; that permitting the possession to be retained was equivalent to an actual delivery, and, with the payment of the purchase-money, took the case out of the statute.⁴ But, upon a bill for specific performance, it appeared that the plaintiff, through whose land the defendants, a railroad corporation, were authorized to make their road, gave them a bond to

¹ Jervis v. Smith, 1 Hoffm. Ch. 470; Givens v. Calder, 2 Desaus. 171; Hord v. Bowman, 1 Freem. Ch. 290; Smith v. Underdunk, 1 Sandf. 579; Lord v. Underdunk, Ib. 46; Thompson v. Scott, 1 M'C. Ch. 32; Carlisle v. Fleming, 1 Harr. 421; Eaton v. Whitaker, 18 Conn. 222; Goodhue v. Barnwell, 1 Rice, Eq.

198; Phillips v. Thompson, 1 Johns. Ch. 131; Blakeney v. Ferguson, 3 Eng. 372.

² Pugh v. Good, 3 W. & S. 56.

³ Smith v. Smith, 1 Rich. Eq. 130.

⁴ Drury v. Conner, 6 Harr. & John. 288.

convey to them by a certain day, on payment of a certain price, so much of his land as should be taken by them by authority of law for their road. The defendants, within the time allowed by law, entered upon and took the land; but, upon the plaintiff's tendering them a deed on the day appointed, refused to pay the price. Held, the bill could not be maintained, the defendants not having signed any written agreement. Bigelow, J., says: "It does not appear that the defendants took possession of the land under the contract. They had the right, under their acts of incorporation, and the general statutes of the Commonwealth, to enter upon the land of the plaintiff and construct their railroad over it, without any contract, and even against the consent of the owners. For aught that appears in this case, all the acts of the defendants, relied on as showing part-performance of the contract, were done under the rights and powers conferred on them by statute, and not in pursuance of the contract."¹

10. With what degree of distinctness and certainty the terms of the contract itself are to be shown, in order to sustain a claim upon the ground of part-performance, has been matter of somewhat conflicting decision. The prevailing rule, however, appears to be, that, to obtain specific performance of a parol contract for the sale of lands, it must be clearly, fully, and satisfactorily shown what the agreement was, and that the plaintiff has performed, or has been, and is, able and willing to perform, his part of the contract.²

11. The following cases may be cited as illustrating the general principles above stated.

12. A mother desired certain persons to bear witness, that she had purchased a particular tract of land for her son, a minor; and verbally agreed with her brother, acting for the son, to give him the land, in consideration of the son's

¹ *Jacobs v. Peterborough, &c.* 8 Cush. 223-4. *Carroll*, 1 B. & Be. 265; *Reynolds v. Waring*, You. 346; *Mortimer v. Orchard*, 2 Ves. 243; 5 Vin. Abr. 523, pl. 40. See also *Allen v. Bower*, 3 Bro. Symondson *v. Tweed*, Prec. Ch. 374; 149; *Clinan v. Cooke*, 1 Scho. & L. 22; *Forster v. Hale*, 3 Ves. 712; *Savage v. Mundy v. Jolliffe*, 9 Sim. 413.

² *Thompson v. Scott*, 1 M'C. Ch. 32; *Hall v. Hall*, 1 Gill, 383; 6 Ves. 470; *Symondson v. Tweed*, Prec. Ch. 374; 149; *Clinan v. Cooke*, 1 Scho. & L. 22; *Forster v. Hale*, 3 Ves. 712; *Savage v. Mundy v. Jolliffe*, 9 Sim. 413.

relinquishing his claim to his father's personal estate. The mother gave him possession of the land, which the son used and improved as his own until his death, having released his claim to his father's personal estate. Held, the agreement should be specifically performed.¹

13. Agreement to convey to trustees for creditors, in consideration of an extension. The trustees took possession, and the extension was granted. Held, the contract should be specifically performed.²

14. Bill in equity to compel performance of an agreement to lease. The defendant, having a freehold estate in land of his wife, entered, in the fall of the year, into a parol agreement with the plaintiff, that he would erect upon the land a substantial brick store, and have it completed by the first day of April then next; and that he would let such store to the plaintiff for three years, for the yearly rent of \$500, to be paid quarterly. He erected such store, and the plaintiff immediately took possession, and occupied for one year, paying the rent quarterly. During the year, the defendant gave the plaintiff notice to quit, and brought a summary process to eject him. Held,

1. That the agreement was within that clause of the statute, which relates to the sale of lands, &c.

2. That there was a part-performance, sufficient to take the case out of the statute, and authorize a decree for specific performance.

The plaintiff, after the erection of the store, and before the commencement of the suit, offered to the defendant a writing in the form of a lease, to be executed by him, providing, that if the store should be destroyed by fire, or rendered unfit for use, the payment of rent should cease, until it should be put in good order by the defendant. The defendant refused to execute such lease, or even to read it, saying, "I have no lease to execute." Held,

¹ *Simmons v. Hills*, 4 Harr. & McH. 252.

² *Moale v. Buchanan*, 11 Gill & John. 314.

1. He was not bound to execute the lease offered, or any lease containing such a provision; but,

2. This did not excuse him from executing a lease with the usual provisions.¹

15. Although, since the statute, a parol *partition* of lands is invalid, a Court of Equity, it seems, will enforce specific performance of such agreement, where it has been partly carried into execution.² Thus, an agreement was made between two brothers, who had always lived together, and owned their property in common, that one of them, having a family, should provide for and take care of the other, who had no family, and who was subject to epileptic fits, during his life; in consideration that the former should have all the real and personal estate of the latter. Held, the contract should be enforced in equity.³ (s. 19.)

16. G. and W., brothers, being jointly interested in the real estate of their father, as tenants in common, G. agreed to relinquish his interest, in exchange for a quantity of medicines, and the good-will of his brother's business as a physician; in consequence of which agreement, W. took possession of the real estate, made improvements, and afterwards sold the same to T., who also made valuable improvements. Held, this was sufficient, in equity, to take the case out of the statute, and T. was entitled to a conveyance of G.'s interest, and to a perpetual injunction against a suit which had been instituted by G. for the recovery of the premises.⁴

17. Equity decrees the specific execution of a parol agreement, after a part performance, and notwithstanding the express provisions of the Statute of Frauds, on the ground of *fraud*, in refusing to perform, after performance by the other party, and to prevent the statute from being an engine

¹ Eaton v. Whitaker, 18 Conn. 222.

² Goodhue v. Barnwell, Rice, 198.

³ Rhodes v. Rhodes, 3 Sandf. Ch. 79.

⁴ Town v. Needham, 3 Paige, 545;

Wetmore v. White, 2 Caines, Cas. 87; Moreland v. Lemasters, 4 Blackf. 383; Byrd v. Odem, 9 Ala. 756; Fenucane v. Kearney, 1 Freem. 65, 69.

of that fraud, which it was enacted to prevent.¹ This principle is perhaps best illustrated, by that somewhat numerous class of cases, involving a *breach of trust*, where a legal title is conveyed to one person, by whom the consideration is paid, but for the benefit of another, to whom the nominal purchaser verbally agrees to transfer the estate, upon being reimbursed the sum paid out. Thus, in such case, it is held, that, where a party has paid money upon a contract within the statute, and a recovery of the money will not restore him to his former situation, he is entitled to specific performance.² As where A. agreed to purchase land of B. on condition that a mortgage on the same and other lands, held by C., should be discharged from the land, and it was thereupon verbally agreed between A., B. and C., that a part of the consideration should be paid on the mortgage to C., who should, at the same time, execute a release of that part of the premises. The purchase was accordingly completed, A. paying the money, of which C. received the sum agreed on, but C. excused himself from executing the release at that time, saying that he would give it at any time when called upon. Held, A., notwithstanding the statute, was entitled to a specific performance of the agreement to execute the release.³ So, where lands of A. were sold under execution to B., and B. sold them to C., C. having agreed verbally with A. that he would purchase them of B., and retain them until the rents and profits should pay the redemption-money; held, the agreement was not within the statute, being a mere extension of the time of redemption.⁴ So, where A. obtained the legal title to land, as security for the money advanced by him to B., the vendor, for C., the vendee, promising to reconvey the same to C., on repayment of the sum so advanced, with 20 per cent. interest, but fraudulently sold the land to the defendant, who bought with notice; held, the

¹ Maryland, &c. v. Schroeder, 8 Gill & John. 94.

² Malins v. Brown, 4 Comst. 403.

³ Ibid.

⁴ Griffin v. Coffey, 9 B. Mon. 452.

contract was not void under the statute, but equity would adjudge the defendants trustees for the party defrauded, and decree specific performance, or pecuniary compensation.¹ So, A. and B. obtained the legal title to land, for a small sum advanced to C., not being a fourth part of the value of the land; promising verbally to reconvey to C., on repayment of the sum advanced, with interest; and afterwards fraudulently reconveyed the land to a *bonâ fide* purchaser. Held, a demurrer, insisting on the statute, should be overruled, the statute being made to prevent fraud, not to protect it; and that A. and B. should be holden as trustees of C., for the value of the land, beyond the sum advanced, and interest.² So, A.'s farm being about to be sold, on a decree of foreclosure, for a debt of \$430, he applied to B. to advance that sum, to save the farm to A.; and it was agreed between them, verbally, that B. should become the purchaser, and hold the premises as security for the advance. B. accordingly became the purchaser for \$680, received a deed from the master, and paid the \$430 due the mortgagee, and no more. Held, the agreement was within the statute; that B. was entitled to hold the land for his own benefit, but was bound to pay to A. the residue of the \$680, after paying off the mortgage.³ (a) So, upon a bill for injunction, it appeared that the defendant agreed, by parol, with his brother, who was infirm, and whose land was about to be sold on execution, to purchase the land for the brother's benefit, and as a home for his family, and to give him the benefit of the pur-

¹ Jackson v. Gray, 9 Geo. 77.

³ Bander v. Snyder, 5 Barb. 63.

² Cameron v. Ward, 8 Geo. 245.

(a) But where A. agreed with B. by parol, at B.'s request, to attend a sale of B.'s farm under a decree of foreclosure, purchase the same in his own name, and give B. two weeks to redeem; and A. did so, and afterwards, B. failing to redeem, A. sold the farm for a greater sum than he paid for it; Held, in an action by B. against A. to recover the surplus, that the agreement was void, being contrary to the statute. Lathrop v. Hoyt, 7 Barb. 59.

chase, when he should refund the money. The defendant announced the agreement at the sale, bid off the land for a nominal price, and paid it. The brother remained in possession till his death, when the plaintiff, his widow and heir, occupied the land. The defendant then took a deed from the sheriff, and brought an action at law to dispossess the plaintiff. Held, the defendant's conduct was fraudulent, and the Statute of Frauds was no defence against the plaintiff's claim to have the deed cancelled.¹ (a)

18. Upon the ground last stated, that the principle of part-performance rests on *fraud; the payment of money*, more especially of only part of the price, cannot, in general, be regarded as a sufficient part-performance. In such case non-performance would not operate a fraud upon the party, because the money may be recovered back.² (b) So, payment

¹ Cox v. Cox, 5 Rich. Eq. 365.

² Hatcher v. Hatcher, 1 McMn. Eq. 311; Jackson v. Curtwright, 5 Munf. 308; Sites v. Keller, 6 Ham. (Ohio), 207; Pollard v. Kinner, Ib. 231; Allen v. Booker, 2 Stewart. 21; Meredith v. Naish, 3 Stewart, 207; Barickman v. Knykendall, 6 Blackf. 21; McKee v.

Phillips, 9 Watts, 85; Parker v. Wells, 6 Wharton, 153; Hatcher v. Hatcher, 1 McMullan, 311; Smith v. Smith, 1 Richardson, Eq. 130; Eaton v. Whitaker, 18 Conn. 222; Finucane v. Kearney, 1 Freem. Ch. 65; Hood v. Bowman, Ib. 290, 294.

(a) Upon a somewhat similar ground, a party cannot avoid the effect of part-performance, by buying in a prior title. Thus, a public survey was held for sale of an estate, an offer for it accepted, conveyances ordered, and possession delivered. But, disputes arising about settling the conveyances, the purchaser obtained an assignment of a mortgage upon the estate, antedated it, and refused to go on with the purchase. Held, though the agreement was parol, yet it was binding. Pyke v. Williams, 2 Vern. 465.

(b) In an early case, (Lord Fingal v. Ross, 2 Eq. Cas. Abr. 46, pl. 12,) Lord Chancellor Cowper remarked, that the clause of the statute relating to the sale of goods expressly provides that *payment of earnest* shall bind the bargain; while it declares that no agreement concerning lands shall be good, unless reduced to writing. Acc. Buckmaster v. Harrop, 7 Ves. 341. Mr. Sugden says, (1 Sugd. 168,) the payment of a *small sum* cannot be deemed a part-performance. The *dicta* are in favor of a *considerable sum* being a part-performance, but this construction is not authorized by the statute. He refers to the judgment of Sir Wm. Grant, in Butcher v. Butcher, (9 Ves. 382,) as showing the impossibility of drawing any such line of distinction be-

of the auction duty is not a part-performance, taking an agreement out of the Statute of Frauds, because the revenue laws would thus be made to operate beyond their direct and immediate purpose.¹ So, the defendant paid to an auctioneer, an agent for the plaintiff, a vendor, £50 "as a deposit and part-payment of £1,000," for the purchase of hereditaments, taking a receipt; "the terms to be expressed in an agreement to be signed as soon as prepared." The defendant had previously approved of the draft of the contract, and, at the time of taking the receipt, agreed to sign the contract the next day; but refused to do it, and demanded back the deposit. Held, the Statute of Frauds

¹ *Buckmaster v. Harrop*, 7 Ves. 341.

tween the *amounts* of purchase-money paid. So, in *Buckmaster v. Harrop*, 7 Ves. 341, it is said, that whether one guinea or fifty guineas be paid, it can make no difference. Acc. *Cordage v. Cole*, 1 Saun. 319. But, in an earlier case, it was held that, though payment of a *substantial part* of the purchase-money will take an agreement out of the statute, payment of a *small part*, as five guineas, the purchase-money being one hundred, will not do. The plea of the statute was allowed; with an intimation from the court, that, under the circumstances of the case, the bill would be dismissed with costs. *Main v. Melbourn*, 4 Ves. 720. A different doctrine from that stated in the text has sometimes prevailed; and several old cases have been relied upon to sustain it. *Ferne v. Bullock*, Toth. 206; *Clark v. Hackwell*, Ib. 228; *Voll v. Smith*, 3 Cha. Rep. 16; *Moyl v. Horne*, Toth. 67; *Alsop v. Patten*, 1 Vern. 472; *Lacon v. Mertin*, 3 Atk. 1; *Dickinson v. Adams*, 4 Ves. 722. But see *William v. Nevill*, Toth. 135; *Miller v. Blandist*, Ib. 85; *Simmons v. Cornelius*, 1 Cha. Rep. 128; 2 Freem. 128; 1 Freem. 486, cas. 664 b; *Seagood v. Meale*, Prec. Cha. 560; *Coles v. Trecothick*, 9 Ves. 234. One of two joint lessees verbally agreed to sell his interest to the other, and accepted a pair of compasses in hand to bind the bargain. Whether this is within the Statute of Frauds, Qu.? *Alsop v. Patten*, 1 Vern. 472. A. agreed with B. for the purchase of nine houses, mortgaged to C., and paid him a guinea in earnest. B. wrote a note to C., desiring him to deliver up the buildings, he having disposed of them, which C. refused, unless all the mortgage-money was paid, and afterwards purchased them himself. On a bill brought by A. for specific performance, held, that neither the earnest nor the note, which was only evidence of assent, but did not ascertain the terms of the agreement, was sufficient to take it out of the Statute of Frauds. *Seagood v. Meale*, Prec. Cha. 560.

was a good defence to a bill for specific performance.¹ So the purchaser's having deposited part of the purchase-money with her agent, to pay the vendor as soon as he should execute the deeds, and the agent's informing the vendor of it, are not such a part-performance as takes the case out of the statute.²

19. But, where the consideration of a verbal sale of land consists of services to be rendered, which are of such a peculiar character, that it is impossible to estimate their value to the vendor by a pecuniary standard, and the vendor did not intend so to measure them; the performance of the services will entitle the vendee to a specific performance. Thus, an agreement was made between two brothers, who had always lived together, and owned their property in common, by which the one, having a family, agreed to provide for and take care of the other, who had none, and who was subject to epileptic fits, during his life, in consideration that the former should have all the real and personal estate of the latter. Held, after performance of the services, the contract should be enforced.³ (s. 15.)

20. The principles above stated, with reference to *part-performance*, seem to be well-established by the weight of English and American authorities. There are, however, some qualifications and exceptions, which equally require to be noticed. Thus, as has been already stated, (§ 8,) acts of part-performance of a parol agreement will not take it out of the statute, unless they are solely applicable to the agreement. (a) Upon this ground, repairs made by a tenant under his old lease, upon the expectation of getting a new one, form no consideration for a promise to give a new lease.⁴ So, a mere continuance in possession, by a tenant,

¹ Wood v. Midgeley, 27 Eng. Law & Eq. 206.

³ Rhodes v. Rhodes, 3 Sandford, 279.

² Givens v. Calder, 2 Desaus. 171.

⁴ Byrne v. Romaine, 2 Edw. 445, 446. See Lacon v. Mertins, 3 Atk. 1.

(a) Part-performance must be such, as to make the party seeking to enforce an execution a wrongdoer, by reason of his acts, and a complete performance a protection against any liability for such acts. Ham v. Goodrich, (N. H.) Law Rep. Nov. 1856, p. 390.

after his purchase, is not sufficient to take the case out of the statute.¹ So where, upon the faith of a verbal promise of renewal, a tenant rebuilt a party wall; the agreement was held to be within the statute; the act being an equivocal one, which would have been done equally without any agreement; and moreover, the landlord being liable to an action to recover back the cost, if it was to be borne by him.² So, the vendee's renting a part of the land, as agent of the vendor, will not entitle the vendor to specific performance, as it does not purport to be in pursuance and execution of the agreement.³ So, to constitute a valid parol sale under the statute, the possession must be exclusive of the vendor, and the boundaries distinctly ascertained. Thus, A. entered, under a parol agreement with B. to receive one hundred acres, including the mansion-house, on one side of a larger tract; lived with B., performed the consideration, and farmed the land in the manner it had been previously farmed, or with his own and B.'s cattle; having also an agreement to farm the whole of the larger tract for one year, for payment of taxes, and making fences. Held, within the statute.⁴

21. Promise by a father to one of his sons, that, if the latter would continue with him, he would leave him the farm at his death. The son brings a bill for specific execution against the heirs at law of the father, on the ground of performance by the son. Bill dismissed.⁵ So, in case of an agreement between father and son, that if the son, with his family, would come and live with the father, and take care of him and his farm during his life, he would give the son his homestead farm; the father is not bound to give up possession during his life, such surrender not being necessary to a performance of the conditions. The agreement merely binds the father to give the son a title either by devise, or by a

¹ Johnston v. Glancy, 4 Blackf. 94, 99; Hood v. Bowman, 1 Freeman, 290-294; Wills v. Stradling, 3 Ves. 378; Savage v. Carroll, 1 B. & B. 265.

² Frame v. Dawson, 14 Ves. 386. See Lyndsay v. Lynch, 2 Scho. & Lef.

1; O'Reilly v. Thompson, 2 Cox, 271.

³ Anderson v. Chick, Bai. Eq. 118.

⁴ Frye v. Shepler, 7 Barr, 91.

⁵ Carlisle v. Fleming, 1 Harr, 421, 430.

conveyance to take effect at his death. Hence, where a bill, brought by the son to enforce the agreement, set it forth as above stated; held, the plaintiff's possession, during the father's life, was not a part-performance.

22. Verbal agreement, that A. will convey a tract of land, and pay a sum of money, to B., in consideration that B. shall make a deed, confirming the sale of another tract to C. Held, the execution of the deed of confirmation was not such a part-performance, as made the contract binding upon A.¹

23. A parol sale, upon which money has been paid, and possession delivered, is not good against a *bonâ fide* purchaser, without clear evidence of notice to him, either actual or legal. Legal notice exists, only where there is a violent presumption of actual notice. Undisturbed possession has generally been considered legal notice; but it must be clear and unequivocal. Thus, A. bought by parol from B. a corner of B.'s tract, paid for it, was put into possession, and had buildings erected, but there was no survey of the part, or other admeasurement. On B.'s part there were a forge, dwelling-house, grist and saw mill, and buildings for the workmen, which, with A.'s buildings, might strike the eye as one establishment. Held, the possession of A. was not legal notice of his title, to a purchaser at sheriff's sale, under a judgment against B.; particularly if A. gave no actual notice of his title, when he probably knew of the judgment, execution and sale.²

24. It requires to be further stated, that, although the general doctrine as to part-performance has been for the most part recognized, with other principles of the English law, in the United States; yet it has not been universally adopted. Thus, in Massachusetts, where there is no Court with full equity powers, there has been a series of cases, all tending to the conclusion, which seems now finally established, that part-performance does not take a parol contract relating to

¹ Chambers v. Lecompte, 9 Missouri, 566.

² Billington v. Welsh, 5 Binn. 131.

lands out of the Statute of Frauds. Any earlier decisions, which may have incidentally recognized the contrary doctrine, may be considered as now overruled. Thus it is held, that, although a defendant in equity may rely upon a verbal agreement, for the purpose of showing that it would be inequitable to enforce specific performance of a written one; the Court have no power to decree specific performance of a contract, unless every part of it has been reduced to writing.¹ So, in a case of assumpsit, to recover money alleged to have been paid on a consideration which has failed. The money was paid, on a parol agreement to purchase of the defendant a certain house and estate, which were to be conveyed to the plaintiff free of incumbrance, the defendant undertaking to discharge a mortgage on the estate, which was subsequently done, but, before the estate was conveyed to the plaintiff, the house was consumed by fire. It was held, that the contract was void by the Statute of Frauds, that the payment of the money did not take the case out of the statute, that the loss must fall upon the defendant, no actual conveyance having been made, and neither party in fault, and that the plaintiff was entitled to recover.² And, in a very late case, where the general question was more distinctly presented than in any preceding one,³ it is expressly decided, that part-performance does not, in Massachusetts, take a case out of the statute. Bigelow, J., says: ⁴ " This Court has no power to enforce in equity the specific performance of any but written contracts. The ground on which Courts having full chancery powers have interfered to enforce parol contracts concerning the sale of lands which have been partly performed, has been to furnish remedies against fraud, and not because the contracts, as such, were binding on the parties. Such cases are not within the equity power of this Court." The same point has been settled, upon similar

¹ Brooks v. Wheelock, 11 Pick. 438.

² Thompson v. Gould, 20 Pick. 134.

³ Jacobs v. The Peterborough, &c., 8 Cush. 223.

⁴ Ibid. 225.

grounds, in Maine.¹ So, it is said to be the settled doctrine in Mississippi, that part-performance will not take a parol sale of lands out of the Statute of Frauds, and that no exceptions of that character will be ingrafted on the statute.² So it is held in Tennessee, that a Court of Equity has no power to relieve against the provisions of a statute in any case; that parol proof is inadmissible, to establish a contract required by statute to be in writing; or to show part-performance, from which the contract may be inferred. The rule is adopted, without qualification, that to make a contract for the sale of land valid, it must be in writing, and signed by the party to be charged therewith.³ In New York it was early held, that a contract cannot rest partly in writing and partly in parol; that, where a part-performance is set up, the party cannot resort to parol evidence in aid of the written agreement; but the terms must distinctly appear, or be made out to the satisfaction of the Court.⁴ So, in New York, it is held, that the rule of the Court of Chancery, by which parol contracts for the sale of real estate are taken out of the Statute of Frauds by a part-performance, ought not to be extended to new cases, which do not come clearly within the equitable principles of the previous decisions on that subject.⁵ So in Pennsylvania it was early held, that possession alone will not take a case out of the act against frauds, &c.; though it is a strong circumstance connected with others.⁶ Thus, possession begun before a parol agreement of lease for seven years, and continued afterwards, is of too doubtful a nature to be considered as part-performance.⁷ And, in a much later case, it has been decided, that the delivery of possession of *part* of the property, in compliance with a parol contract for the sale of land, is not such

¹ *Bubier v. Bubier*, 24 Maine, 42; *Wilton v. Harwood*, 23 Maine, 131.

² *Beaman v. Buck*, 9 Sm. & M. 207; *Box v. Stanford*, 13 Sm. & M. 93.

³ *Patton v. McClure*, M. & Y. 333.

⁴ *Parkhurst v. Van Cortlandt*, 1 John. Ch. 274.

⁵ *German v. Machin*, 6 Paige, 289, 293.

⁶ *Bassler v. Nieslar*, 2 S. & R. 355.

⁷ *Jones v. Peterman*, 3 Serg. & Rawle, 543. So in *Indiana*; *Johnston v. Glancy*, 4 Blackf. 94; and in *Hatcher v. Hatcher*, 1 M'Mul. Eq. 311.

an execution of it, as will take it out of the Statute of Frauds and Perjuries.¹ But the doctrines of the English Chancellors concerning part-performance have finally been adopted as the law of Pennsylvania, under the Act of Assembly against frauds and perjuries, notwithstanding the omission in the latter of the 4th section of the English statute.² And the rule elsewhere adopted seems to be finally established, that, to take a case out of the statute, there must be possession, and such part-performance, as cannot be compensated in damages;³ and also *exclusive* possession.⁴ Thus, the plaintiffs claimed under the will of their grandfather; the defendants under a parol gift or contract between their father and grandfather. Held, under the Statute of Frauds, the defendants had the burden of proof, that the contract was made; the land clearly designated; open, notorious, and exclusive possession taken and maintained under and in pursuance of the contract; and that they had made improvements which did not admit of pecuniary compensation.⁵ So, in North Carolina, part-performance, such as payment of the whole purchase-money, and delivery of possession to the vendee, will not dispense with a writing, if the statute be insisted on, nor admit parol proof of a contract, different from that stated in the answer.⁶ (a)

25. It has been seen, (s. 17,) that part-performance is held to take a parol contract out of the statute, on the ground of *fraud*, in the absence of which, actual or constructive, equity will not interfere to enforce the contract, though in part executed. It is further held, that specific execution of a parol contract for land will not be decreed, where its operation would be harsh on any person concerned. But, if

¹ Allen's Estate, 1 Watts & S. 383, 385.

² Pugh v. Good, 3 Watts & Serg. 56.

³ Moore v. Small, 19 Penn 461.

⁴ Blakeslee v. Blakeslee, 22 Penn. 237.

⁵ Moore v. Small, 19 Penn. 461.

⁶ Allen v. Chambers, 4 Ired. Eq. 125; Ellis v. Ellis, 1 Dev. Eq. 180, 341.

(a) Whether it would be otherwise, if the contract partly performed were admitted by the answer. Qu.? Ellis v. Ellis, 1 Dev. Eq. 341.

specific execution is refused, for any cause, the Court will decree *compensation* to a party, who may have expended his money on the property of another, on the faith of such contract.¹ Thus, the defendant agreed to assign a term of years in his house and certain goods, for 200 guineas, paying one in hand as earnest, and, three days after, nineteen more; and it was also agreed that the bargain should be put in writing by a certain time. Bill for specific performance. Plea, the Statute of Frauds, and that the money was only paid for the lease, but confessing the receipt of the twenty guineas, and offering to repay them. The plea was overruled, but it was held to be clear that the defendant ought to repay the money.² So, the defendant agreed to give the plaintiff a lease, rendering rent, the plaintiff paying £150 fine. The plaintiff paid £100, but the defendant refused to perform the agreement. Upon a bill filed for specific performance, held, the agreement was within the statute, but the £100 was decreed to be refunded.³ So, in New York, where, as has been seen, the general doctrine of part-performance has not been fully adopted, if possession has been taken, and lasting improvements made, under an imperfect agreement; though the Court will not grant relief, on the ground of part-performance, yet the bill will be retained, for the purpose of a reasonable compensation for such improvements.⁴ Thus, commissioners, under an act of the Legislature, were held to have no right to use the lands of the plaintiff, or to remove or destroy his property, without a valid and legal contract with him for that purpose, or until compensation had been made and tendered to him according to the act. And though a bill filed against the commissioners, to enforce a parol contract for compensation, could not be sustained, as being within the statute; yet the Court retained the bill, and awarded an issue of *quantum damnificatus*, to assess the

¹ *Anthony v. Leftwich*, 3 Rand. 238, 246.

² *Leak v. Morrice*, 2 Ch. Cas. 135.

³ *Lord Fingal v. Ross*, 2 Eq. Cas. Abr. 46, pl. 12.

⁴ *Parkhurst v. Van Cortlandt*, 1 John. Ch. 274.

damages, as the plaintiff had no remedy, or at best a doubtful and inadequate one, at law.¹ So it is held in North Carolina, that, although payment of the purchase-money, taking possession, and making improvements, will not entitle the vendee to specific performance; yet he has in equity a right to an account of the purchase-money advanced, and the value of his improvements, deducting therefrom the annual value during his possession.² But a later case decides, that, although in case of part-performance, if the defendant admits the contract, as stated by the plaintiff, and the part-performance, but relies on the statute, the Court will order an account, and decree compensation; if the contract is denied, the Court can grant no relief, because it can go into no proof of a contract, variant from that stated in the answer.³

¹ *Phillips v. Thompson*, 1 John. Ch. 131, 149.

² *Albea v. Griffin*, 2 Dev. & Batt. Eq. 9; *Baker v. Carson*, 1 Ib. 381.

³ *Dunn v. Moore*, 3 Ired. Eq. 364. *Allen v. Chambers*, 4 Ired. Eq. 130.

CHAPTER X.

CONSTRUCTION OF CONTRACTS.

1. General rules.
6. Certainty.

13. Separate instruments.

1. HAVING considered the *elements and requisites* of a contract for the sale and purchase of lands, we now proceed briefly to speak of the *construction* of such contract. In this connection, the agreement itself is assumed to be, as the Statute of Frauds requires, *in writing*, and the present inquiry therefore involves the important subject of the admissibility of *parol evidence*, in reference to such written agreement.

2. It is a general rule, that words shall be so construed as to have some meaning, rather than rejected. Thus, where a vendor proposes a price, clear of all expenses, the agreement is construed to mean that the purchaser shall bear the expense of making out the title; the law imposing on him the expense of the conveyance.¹

3. The meaning of words may be determined by the nature of the subject to which they relate. Thus, in case of a purchase of a rectory for "the use of the parishioners *and inhabitants*," the Court suggested various senses of the term "inhabitant," with reference to the nature of the subject.²

4. A. contracted to sell and plant a quantity of trees on B.'s land; and also, that he would keep in order the trees aforesaid for two years, and replace such as should die during that period "except from injury by sheep, game, or cattle."

¹ Stratford v. Bosworth, 2 Ves. & Bea. 341.

² Attorney-General v. Foster, 10 Ves. 335.

In an action to recover the price, held, the words "keep in order" meant, not to prune only, but to weed and clear the ground. (a)

5. A stipulation was made, in articles before marriage, that the intended settlement, which related to estates in Ireland, should contain all the covenants, provisions, and conditions, usually contained in marriage settlements made in England. Held, to authorize the insertion of a power of sale and exchange, under which lands in England might be taken in exchange for lands in Ireland. A reference was made to the master, to inquire whether certain proposed powers of leasing were usual in that part of Ireland where the estates were situated, and whether any circumstances connected with the property rendered such powers expedient, and to the interest of all parties, with liberty to state special circumstances.¹

6. With regard to the construction of contracts for the sale of land, the same reasonable *certainty* (b) is required to render them valid, as in the case of other written agreements. And where a party has failed to prove the terms of the agreement relied on, equity will not assist him, by directing an issue to ascertain the terms. A plaintiff is bound to state in his bill the agreement relied on, and to prove it as stated.²

7. An agreement to sell land, generally, means the whole interest of the vendor.³

8. An agreement in writing, for the sale of a house, did not, by description, ascertain the particular house, but referred to the deeds, as in possession of a person named.

¹ Bedford v. Abecorn, 1 Myl. & Cra. 312.

² Savage v. Carroll, 2 Ball. & Beatt. 444.

³ Bower v. Cooper, 2 Hare, 408.

(a) Also, that evidence of non-performance by A. of any part of the contract on his part was admissible in reduction of damages. Allen v. Cameron, 1 Crompt. & Mees. 832.

(b) Whether the purchase of a *good will* falls within this requisition, see Coslake v. Till, 1 Russ. 376.

Held, the agreement was sufficiently certain, if it could be ascertained by an inquiry before the master, that these deeds referred to the house.¹

9. In a contract for the conveyance of land, the land was described as "lying on the southwest side of Black River, adjoining the lands of William Haffland and Martial." Held, the description was sufficiently certain to entitle the vendee to a specific performance.² So, where a contract of sale described the land, as lying in a certain town, county and State, and the 240 acres owned by the vendor; held, sufficiently certain.³ So, the certainty of a contract may in part depend upon some subsequent act of the vendee. Thus, in case of a bond, conditioned to convey a certain quantity of land in one, two, or three surveys, at the election of the obligee; held, the selection must be made, and the land surveyed, before any obligation arose to convey. There being a latent ambiguity in the description, which could be explained only by an actual survey; held, the contract could not be rescinded before such survey, showing whether the bond could be complied with.⁴

10. But where A. and B. agreed in writing, that A. had sold to B. "all that part of a tract of land called C., lying adjoining the turnpike road near where D. now lives at, &c.;" held, this agreement contained no sufficient description of the land, the bounds and quantity being both uncertain, and could not be enforced any further than as admitted by B.⁵ So, a contract for a lease of "coals, &c.," or "minerals," is too ambiguous to be carried out by the court.⁶ So, upon the ambiguous terms of a contract, as including or excluding the timber, the purchaser's bill for specific performance was dismissed; and, having throughout insisted upon his construction, held, he could not compel the vendor to convey, upon the terms he originally offered.⁷

¹ *Owen v. Thomas*, 3 My. & K. 353.

² *Kitchen v. Herring*, 7 Ired. Eq. 190.

³ *Richards v. Edick*, 17 Barb. 260.

⁴ *Purcell v. McCleary*, 10 Gratt. 246.

⁵ *Dorsey v. Wayman*, 6 Gill, 59.

⁶ *Price v. Griffith*, 8 Eng. L. & Eq. R. 72.

⁷ *Clowes v. Higginson*, 1 Ves. & Bea. 526.

11. Lessees of a coal mine covenanted with the lessors, that they would, by a certain time, get all the demised coal in the township of B., "not deeper than or below the *level* of" the bottom of the A. mine, under a certain point at the surface. In an action upon the covenant, a question arose, whether "level" was used in the ordinary sense of a horizontal plane, or in a peculiar sense, having reference to the drainage. Held, that evidence was admissible, to show the understanding of the term "level," used as in the above lease among coal miners. It was referred to an arbitrator to receive such evidence and state a case for the opinion of the court. He found, that the mine was situate within an extensive coal-mining district in the county of Lancaster, and that, "according to the custom and understanding of miners throughout that district," the terms "level," "deeper than," and "below," signified, &c.; stating the construction of the terms, which was in favor of the defendant. It did not appear, as to some of the parties to the lease, that they resided within the district, and they were named, in the lease, as of other places. Held, the existence of the custom in this district did not raise a conclusion of law, that the parties used the terms accordingly, but was only evidence for a jury; and that the court could not give judgment for the defendant; although, it seems, they might have done so, if the arbitrator had found the custom of miners without limitation.¹

12. The defendant agreed to sell the plaintiffs, a railroad corporation, "the land they might take on the northerly side of the M. turnpike, adjoining T.'s land, at twenty cents per square foot, for each and every foot so taken by said company." Bill for specific performance. Held, not a sale of the land generally, or of such part of it as the plaintiffs might elect, or of such as they should accept the offer of; but of such part as the plaintiffs might take in the exercise of the authority conferred on them by law.²

¹ Clayton v. Gregson, 5 Adol. & Ell. 302.

² Boston & Maine Railroad v. Babcock, 3 Cush. 228.

13. It has already been seen (ch. 2,) that a contract may consist of separate writings, as well as a single instrument, provided they mutually refer to each other. Of course, a contract thus made is also to be *construed* like one entire agreement. Thus, it was agreed, that for a sum to be fixed thereafter, a lessee would assign his lease, and the furniture and good-will of the property, reserving a certain part. Subsequently, on receipt of this sum, a bill of sale was made of all the above interests, without reservation. Held, the two instruments were to be construed together, and the reservation still took effect.¹ So, equity will enforce a written agreement to convey, though accompanied by another written agreement, that the party will forfeit a certain sum, if he does not convey; the plaintiff showing performance of the terms on which such conveyance was to be made.²

14. A vendor, A., wrote thus to his own solicitor, "B. has agreed to purchase my estate in this county for £60,000, including the timber. I have shown this to B., and given him a copy, not signed as a memorandum." A month afterwards, in the course of correspondence concerning the terms of a formal agreement, B. wrote to the solicitor, "I beg to know when you will forward the agreement to be entered into with A., relative to the purchase I have concluded with him for his estate in this county." Held, the letters, agreement, and memorandum constituted a contract, binding on both parties, and vested a devisable interest in B.³

15. But where terms of sale are stated in connection with one mode of transfer, and the sale afterwards takes place in another mode, such terms will not bind the purchaser. A. and his agent attended an auction for the sale of a house, and had notice of certain conditions there exhibited. A., afterwards, through his agent, and the agent of the vendor, purchased the house. Held, he was not bound by the par-

¹ *Beman v. Green*, 1 Duer, 382.

² *Dooley v. Watson*, 1 Gray, 414.

³ *Morgan v. Holford*, 17 Eng. L. & Eq. 174.

ticulars.¹ So, in order to connect different instruments as constituent parts of one contract, the parties must be the same. Thus, A., by an instrument under his hand and seal, acknowledged the receipt of \$100 from B., which he promised to pay out in the purchase of land in Michigan or Illinois, and to procure deeds of the same; pay three and a half per cent. interest, and act for the mutual interest of both parties; and C., on the same day, and on the same piece of paper, by an instrument under his hand and seal, covenanted and guaranteed the fulfilment by A. of the said agreement. Held, a joint action against A. and C., for breach of the original agreement, could not be sustained. Held, also, that the original agreement, and the guarantee, were different contracts, and could not be united in the same action at common law, nor under § 120 of the code of procedure.²

16. In some cases, a writing may undoubtedly be controlled or explained, as well by a *map* or *plan*, with reference to which the contract is made, as by another accompanying instrument. But it is held,³ that the mere exhibition of the plan of a new street, at the time of the sale of a piece of ground, on which to build a house in the line of the intended street, does not of itself amount to a warranty or engagement, that all which is exhibited on the plan shall be done, more especially where the purchaser has a distinct contract put into the solemn form of a charter containing no such stipulation. Thus, where the governors of Heriot's hospital, and the magistrates of Edinburgh, in selling certain lots of ground for building, in the line of an intended new street, (York Place,) exhibited a plan of the street, and some of the surrounding objects, which represented, or was supposed to represent, certain old buildings, (not belonging to the vendors,) as taken down, so as to make the street of equal breadth through its whole extent, though the fen charters granted to the purchasers contained no obligation

¹ Cowley v. Watts, 17 Eng. L. & Eq. 147.

² De Ridder v. Schermerhorn, 10 Barb. 638.

³ Foeffe's of Heriot's Hospital v. Gibson, 2 Dow. 301.

on the grantors to purchase and remove these old houses; held, that the magistrates were not bound to remove them, or to purchase them for that purpose, when an opportunity offered of doing so at a reasonable price; and that the purchasers were not entitled to retain the fen duty till this was done.

17. A deed dated in 1827, and made between G. Pitt, of the one part, and the other persons, parties to the deed, of the other part, recited, that Pitt, being seised in fee of the lands delineated in the plan thereto annexed (being Pittville,) and having it in contemplation to establish a spa at or near the north end of the lands, and to erect a pump-room at or near the spot marked on the plan, and to lay out the rest of the lands for buildings, pleasure-grounds, roads, &c., had caused the plan to be drawn, whereby the mode in which the lands were intended to be laid out, and the purposes for which they were intended to be converted and used, were described, in order that the beauty and regularity of the whole of the design might be forever thereafter preserved, subject only to such alterations as should be made or approved of by Pitt, his heirs or assigns, and as should not destroy the general beauty of the same design, and that each of the other parties to the deed had purchased or agreed to purchase one or more of the pieces of land described in the plan, as set out for building. The deed then contained covenants by Pitt, his heirs and assigns, to complete the pleasure-grounds, roads, &c., and that they should be enjoyed and used by the occupiers of the houses to be erected on the building ground, and that Pitt, his heirs or assigns, would, on every agreement which should be entered into by him or them, for the sale of any part of the building ground, require the purchaser to covenant with him, his heirs and assigns, not to erect any messuage, on any part of the ground, which might lessen in value any other of the messuages erected, or to be erected at Pittville. In 1833, Pitt agreed to sell lots 2, 3, 4 and 5 of the building ground to Stokes; and Stokes agreed with him to erect three houses on those lots,

and that each house should stand back 25 feet from the western boundary of the lots, and that Stokes, his heirs or assigns, would not do or suffer to be done, on the lots, or in any building to be erected thereon, any act, deed, &c., which might be deemed a nuisance, injury or annoyance, or which might lessen in value any adjoining or neighboring lands or property, or any houses to be erected thereon. Stokes built two houses on lots 2 and 3; and, in 1833, Pitt conveyed those lots to him; and Stokes, for himself, his heirs and assigns, entered into a covenant with Pitt, his heirs and assigns, with respect to those lots and the houses thereon, similar to the last-mentioned stipulation in the agreement. Stokes subsequently gave up lots 4 and 5 to Pitt, and abandoned his agreement as to them, and then sold his house on lot 3 to the plaintiff. Pitt afterwards agreed to sell lots 4 and 5 to Creed. The agreement stipulated that the houses to be erected on those lots should stand back ten feet, at the least, from the western boundary thereof, and it contained a stipulation for protecting the adjacent property from injury, &c., similar to that in Stokes's agreement. Both Stokes and Creed executed the deed of 1827. Creed began to build a house on his lots, thirteen feet distant from the west boundary, which was twelve feet in advance of the plaintiff's house, and which the plaintiff alleged would be a nuisance or annoyance to him, and would lessen the value of his house, and, consequently, would be a violation of the covenant in the deed of 1827, and of the agreement of 1833. Held, that the plan annexed to the deed of 1827 was merely a general plan, and was not intended to be strictly adhered to, but its details might be varied by Pitt, and, with his sanction, by the purchasers from him; and that the plaintiff was not entitled to avail himself, as against either Creed or Pitt, of the covenants of 1827, or of the agreement of 1833, for the purpose of preventing the completion of Creed's house in the manner intended, or the performance by Pitt, of the agreement with Creed.¹

¹ Schreiber v. Creed, 10 Simons, 9.

18. No question more frequently arises, in the construction of the class of contracts under consideration, than that relating to the admissibility of *parol evidence*, to explain, qualify, or control them. Upon this subject, it is held, that evidence in writing, not admitted, as *e. g.* an agreement unstamped, does not prevent parol evidence, if otherwise admissible.¹ But the general rule applies to this class of written contracts as to others, that they cannot be explained, varied, or controlled by parol evidence. Thus, an indefinite written agreement cannot be made sufficient by parol evidence.² So, parol evidence cannot be admitted, that a purchase of an estate, in a party's own name, was in fact made on behalf of another person.³ So, in case of a joint purchase of land, parol evidence is not admissible of a previous agreement for an unequal division.⁴ So, where by a written agreement the plaintiff agreed to sell, and the defendant to purchase, upon the terms stated, the *Leigh* estate; and the defendant agreed to sell, and the plaintiff to purchase, the *Haresfield* estate; and it was not expressed that the two contracts were to be dependent on each other; and the defendant was unable to make a good title to the *Haresfield* estate; held, the plaintiff was entitled to specific performance of the contract as to the *Leigh* estate; and evidence *aliunde* was not admitted, to show the intention of the parties, that the agreement should take effect as an *exchange*.⁵ So, parol evidence is not admissible, to prove an additional rent payable by a tenant, beyond that expressed in the written agreement for a lease.⁶ So, where there was a written agreement for a lease, which was executed accordingly, it was held, that parol evidence was not admissible, that the lease, though in strict conformity with the written agreement, was contrary to its spirit, as there was something *dehors* the contract agreed upon between the parties, yet omitted in the

¹ *Heirn v. Mill*, 13 Ves. 114.

² *Church, &c. v. Farrow*, 7 Rich. Eq. 378.

³ *Bartlett v. Pickersgill*, 1 Cox, 15.

⁴ *Jarrett v. Johnson*, 11 Gratt. 327.

⁵ *Croome v. Lediard*, 2 My. & Kee. 251.

⁶ *Preston v. Merceau*, 2 Black. 1249.

lease; though, if there had not been a written agreement, the evidence might have been admissible.¹ So, evidence is not admissible, (in support of a bill for specific performance,) to prove from conversations before and at the time of signing an agreement for a lease, that the intent of the parties was apparent from the memorandum, though the same was written by the lessee, and the words "clear of all taxes," (which was the purport of the conversation,) were omitted in the memorandum.² So, specific performance of an agreement in writing for a lease for sixty years was refused, upon parol evidence of an alteration stipulated for at the same time, and upon the faith of which the party executed. A distinction was taken between the case of a defendant refusing, and a plaintiff seeking, the execution of an agreement under such circumstances.³ So, an agreement in writing, to convey such lots as the grantor shall select, cannot be changed by parol, so as to require the grantor to convey such lot as the grantee may select.⁴ So, the defendant signed a memorandum, as follows: "I have sold to (the plaintiff) four building lots; first two lots ninety feet front, depth about one hundred and fourteen and ninety-six and a half; next two lots one hundred feet front, depth about ninety-two and seventy-six feet; all the above lots the same as laid down on the plan: First two mentioned lots at five cents a foot; next two lots at four and a quarter cents a foot." The plaintiff brought an action against the defendant, alleging in his declaration, that he had tendered to the defendant twenty-five per cent. of the price, and demanded a deed; that he was ready to execute mortgages for the balance, and that the defendant had refused to execute a deed. At the trial, the plaintiff offered parol evidence, that when the memorandum was executed, it was agreed between him and the defendant, that one quarter of the purchase-money should be paid in cash, on delivery of the deed, and the other three

¹ *Davies v. Tilton*, 2 Dru. & War. 232.

³ *Clarke v. Grant*, 14 Ves. 524.

² *Rich v. Jackson*, 4 Bro. C. C. 514. 659.

⁴ *Wildbahn v. Robidoux*, 11 Mis.

quarters secured by notes and mortgages, and that the notes should be payable in one, two, and three years, with interest yearly. Held, this evidence was inadmissible, both because it would vary the written agreement, the legal effect of which was to pay cash on demand, within a reasonable time; and because it was offered in proof of a contract for the sale of land, contrary to the Statute of Frauds.¹

19. The general rule above stated, however, is not without its exceptions, more especially in Courts of Equity. Thus, although parol evidence in relation to a written contract is excluded for the purpose of *enforcing*, it is sometimes admitted for the purpose of *resisting specific performance*.² Thus, parol evidence of declarations made by an auctioneer at the sale, warranting the quantity, was received in opposition to a specific performance, on the ground of fraud.³ And where a parol agreement, varying the written agreement, is set up by the defendants in a suit for specific performance, and supported by evidence affording a presumption or suspicion of its existence, *an inquiry* will be directed.⁴ So, parol evidence is admissible, in opposition to specific performance of a written agreement, upon the heads of mistake or surprise, as well as of fraud; and upon such evidence, a bill will be dismissed. So, another bill for specific performance, corrected, according to the same evidence, but contradicted by the answer, was also dismissed. (See *Mistake, Fraud*.)⁵ But the plaintiff, in a bill for specific performance, cannot show by parol evidence, that by fraud the written agreement does not express the real terms, and thus obtain specific performance with a variation.⁶

20. The principle, which excludes parol evidence as to written contracts for the sale and purchase of lands, is sometimes brought in question with reference to *subsequent* agreements, attempted to be set up by way of alteration, waiver,

¹ Ryan v. Hall, 13 Met. 520.

² Higginson v. Clowes, 15 Ves. 515.

³ Winch v. Winchester, 1 Ves. & 328.

Beam. 375.

⁴ Van v. Corpe, 3 Myl. & Kee. 277.

⁵ Townshend v. Stangroom, 6 Ves.

⁶ Woollam v. Hearn, 7 Ves. 211.

or discharge of such contracts. And the general rule is, that a written agreement within the Statute of Frauds may be varied by a subsequent, parol, distinct, and collateral agreement.¹ Thus, the plaintiff gave a bond to sell land to the defendant, who gave him notes for the consideration, and took possession; but afterwards, in pursuance of a parol agreement, the land was surrendered to the plaintiff, who finally sold it, though the bond was not cancelled or surrendered. Held, no action would lie on the notes, the whole contract being discharged.² So, where a party voluntarily, though by parol, abandons an agreement in writing, for the sale or exchange of lands, with the assent of the other party, because he is not in a situation to perform the same, it seems, he cannot afterwards demand a specific performance.³ So, where, in articles for the sale of land, no place is mentioned for delivery of the deed; the vendor is bound to seek the vendee, and tender a deed. But the parties may afterwards, by parol, agree on the place; or the vendee may appoint it; and a tender at that place will be sufficient.⁴ But it has been held that a purchaser, who in his written contract stipulates for a good title, cannot be required to complete the purchase upon a defective title, on the ground of a verbal waiver of such stipulation. Thus an agreement was made in writing, to sell several lots of land, and to make a good title to them, and a deposit was paid. It was afterwards discovered, that a good title could not be made to one of the lots. The vendor delivered possession of all the lots, which the vendee accepted. In an action to recover the remainder of the purchase-money, the declaration stated, that the plaintiff agreed to deduce a good title to all the lots except one, and that the vendee discharged and exonerated him from making out a good title to that lot, and waived his right to require the same. Held, oral testimony was not admissible of such waiver.⁵ And, though a parol waiver of a written contract, amounting to a

¹ *Townshend v. Stangroom*, 6 Ves. 328.

² *Dearborn v. Cross*, 9 Cowen, 48.

³ *Baldwin v. Salter*, 8 Paige, 473.

⁴ *Franchot v. Leach*, 5 Cowen, 506.

⁵ *Goss v. Lord Nugent*, 5 Barn. & Adol. 58; 2 Nev. & Mann. 28. See *Inge v. Lippingwell*, 2 Dick. 469.

complete abandonment, and clearly proved, would bar a specific performance, or even parol variations, so acted upon, that the original agreement could no longer be enforced without injury to one party; such variations verbally agreed upon are not sufficient, the situation of the parties in all other respects remaining the same, more especially where the variations are all for the advantage of the defendant, by gratuitous covenants of the plaintiff.¹ And, upon a bill praying performance of an agreement duly signed, but offering to the defendant the benefit of certain variations, contained in a subsequent unsigned memorandum, the Court will decree specific performance with those variations, if the defendant elects to take advantage of them; if not, of the original agreement. A treaty and negotiations for a variation will not amount to a waiver, unless the circumstances show, that the parties intended an absolute abandonment and dissolution of the contract.²

21. Written agreement, on the sale of land, that the purchaser shall search for coal, under the direction of the vendor, for a limited time; and that if, within that time, coal be found in a sufficient body to work, the purchaser shall pay an augmented price for the land. Held, a parol agreement, varying the time within which the search may be continued, (and consequently obliging the purchaser to pay the augmented price,) is within the Statute of Frauds, and will not be enforced by a Court of Equity.³ So it has been held in Massachusetts, where no Court exists with full equity powers, that the Court has no power to decree specific performance of a contract, unless every part of it has been reduced to writing. Thus, where the defendant contracted in writing to execute and deliver a deed of land, upon payment of certain notes given for the purchase-money, and made a subsequent verbal promise to deliver the deed upon payment of the notes before they should fall due; held, a bill in equity against him, for specific performance of the

¹ Price v. Dyer, 17 Ves. 356.

² Robinson v. Page, 3 Russ. 119.

³ Heth v. Wooldridge, 6 Rand. 605, 607.

contract as modified by the verbal agreement, could not be sustained.¹

22. Though parol evidence cannot be admitted, for the purpose of varying a written agreement, it may be, for the purpose of raising an equity, founded on the agreement, by proof of *collateral circumstances*.² (a) "In such cases, parol evidence is not used to vary, contradict, or control the written contract of the parties, but to apply it to the subject-matter. For this reason, any evidence which tends to indicate the nature of the subject-matter included in a written contract, which would otherwise be uncertain or ambiguous, and to determine its application relatively to other objects, is admissible. Thus, to show the position of land and its condition, the mode of its use and occupation, that it had acquired a local designation or name, and whether it was parcel of a particular estate."³ Thus, where a memorandum was given to a tenant, agreeing to renew a lease; held, parol evidence was admissible, that the cellar of the adjoining tenement had been occupied therewith, and was necessary to the tenant's business, for the purpose of showing that it was included in the lease.⁴ So, where an act of Congress provided, that a conferee, whose title was disputed, should prove "inhabitation, cultivation, or possession;" held, they might be proved by parol evidence.⁵ So, a written contract to convey an undivided moiety of land, is not contradicted, varied, or added to by parol evidence, that the parties agreed to, and actually made, a certain division.⁶

¹ Brooks v. Wheelock, 11 Pick. 439.

² Davis v. Symonds, 1 Cox, 402.

³ Per Bigelow, J., Gerrish v. Towne,
³ Gray, 87-8.

⁴ Crawford v. Morris, 5 Gratt. 90.

⁵ Guitard v. Stoddard, 16 How. 494.

⁶ Shiels v. Stark, 14 Geo. 429.

(a) It is said, that to establish a title to land under a parol contract, the contract must be express, (not implied from acts,) with all its terms and conditions, clearly and explicitly proved on both sides, fair, founded on a sufficient consideration; the purchaser must have exclusive possession, under the contract; and it must be so far executed, that it would be a fraud on the purchaser not to execute it entirely. Greenlee v. Greenlee, 22 Penn. 225.

23. Agreement in writing, to convey to G. W. Gerrish "the wharf and flats occupied by Towne & Hardin, and owned by Francis Head." Parol evidence was offered, that two lots of land, only one of which bounded on the sea, with a street between them, were both, at the time of the agreement, owned by Head and occupied by Towne & Co., for the purpose of landing and storing wood and lumber, and known as Towne & Hardin's wharf, and had, before the street was laid out, formed parts of one lot, and been used together, and been occasionally covered by the tide. Held, the description being a general one, referring to extrinsic objects and circumstances, the evidence was admissible, and the vendee was entitled to a conveyance of both lots.¹

24. Bill for specific performance. The plaintiff and defendant entered into an agreement in writing, that the plaintiff should do the brick work and plastering on sixteen tenements in St. Francis Street, between Dearborn and Wilkinson Streets, in Mobile, and on completion of the work, that the defendant should give the plaintiff a deed for three of them, not specifying which of the sixteen. Held, such specification was not *a term of the contract*, but related to the *subject-matter*, as to which parol evidence was admissible; and the parties themselves having subsequently designated the tenements, and, moreover, as they were all of the same value, thus enabling the Court to make the designation, the plaintiff, having fulfilled his part of the contract, was entitled to a decree.²

25. Agreement, to lease for years "the Adams House, situate on Washington Street, in Boston." Held, parol evidence was admissible, that the parties intended to include in the lease only so much of the building as was fitted up for a hotel, by the name of the *Adams House*; and not the distinct shops occupying the whole of the ground-floor except the entrance to the hotel. Shaw, C. J., says, in substance: "What was embraced in the bond by the description,

¹ Gerrish v. Towne, 3 Gray, 82.

² Ellis v. Burden, 1 Ala. N. S. 458.

‘Adams House?’ It is not therein described as a hotel. Looking at the mere contract itself, it might have been free from all ambiguity; because, in applying the description, it must have appeared that there was an estate definitely described, and as well known by that name as the Old State House or the Boylston Market House. It is purely matter of description, and must be established by evidence *aliunde*. But the facts show that there is an estate corresponding in part to the description, to wit, a house known as the Adams House in Washington Street, certain parts of which had been previously, and up to the time and at the time of the contract, used and occupied as a hotel; and certain other parts of it used and occupied for shops for the sale of goods, let to separate tenants, with no interior communication, nor any other connection with the residue, as a hotel, than that of relative position, being supported by the same foundation and sheltered by the same roof. But this is common, especially in cities, with entirely distinct tenements or holdings. This description, therefore, so brief in its terms, when applied to the estate in question, leaves it in doubt whether these stores were excluded or included in the term ‘Adams House.’ In ascertaining what is parcel, what are the monuments, bounds, abuttals, names of streets or places, it is always competent, and indeed often necessary, to go into parol evidence. In seeking for all surrounding circumstances, to throw light on matter of description, the object is to obtain from the words used in the instrument, in the light of all such circumstances, the intent and meaning of the parties. But in coming to apply the description to the contract, there may remain an uncertainty in such application; this constitutes a latent ambiguity; and parol evidence is admissible to explain what was intended.”¹

¹ Sargent *v.* Adams, 3 Gray, 72, 76, 77, 78.

CHAPTER XI.

TIME OF PERFORMING CONTRACTS.

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| 1. Time, when <i>of the essence</i> of the contract.
9. When not of the essence of the contract.
14. Title <i>at the time of hearing</i> , &c., when sufficient.
21. Waiver, &c., as to time. | 29. Necessity and effect of <i>notice</i> in reference to time.
41. Time, in connection with delivery of <i>abstracts</i> .
47. <i>Deterioration</i> from lapse of time.
50. <i>Construction</i> of contracts as to time. |
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1. AMONG the most important incidents of contracts for the sale and purchase of lands, is that of the *time* at which, or within which, they are to be performed. Upon this subject, it has been generally held, more especially *at law*, that time, with reference to the performance of such a contract, is not immaterial;¹ (a) but is of *the essence* of the contract,

¹ *Alley v. Deschamps*, 13 Ves. 225; *Tiernan v. Roland*, 15 Penn. 429; *Harrington v. Wheeler*, 4 Ves. 690, n.; *Benedict v. Lynch*, 1 Johns. Ch. 375; *Guest v. Homfrey*, 5 Ves. 818. See *Brashier v. Gratz*, 6 Wheat. 207. *Wright v. Howard*, 1 Sim. & St. 190;

(a) A bill for specific performance is an application to the discretion, or rather the extraordinary jurisdiction, of the Court, which cannot be exercised in favor of persons who have slept on their rights, or acquiesced for a long time in a title and possession adverse to their claim. Laches is as strong against in not prosecuting as in not defending a suit. *Moore v. Blake*, 1 Ball & Beat. 68. Substantially the same principle applies to the attempted performance of a contract *before* as *after* the time appointed. Thus, in case of an agreement to convey land at a certain time, for which the purchaser was to assign two land warrants; held, a tender of the warrants before the time gave the latter no rights. *Reed v. Redman*, 5 Ind. 409. It is said, the English Court of Chancery has never laid down the broad principle, that time was never important; on the contrary, the present doctrine there is, that where time is really material to the parties,

more especially where the subject is exposed to a daily variation in value; or where lapse of time has made a great change in the circumstances; or where the parties appear to have intended that the time should be strictly adhered to; or where the remedies of the parties are not mutual.¹ So, it has been held, that in an agreement for the sale of lands, time is always material, *when either party chooses that it shall be so*. Each of them has a right to demand the performance of the contract on the stipulated day; and, if the other party is then unwilling or unable to perform, may actually elect to rescind it. And by such an election he is wholly freed from the obligations of the contract; and a Court of Equity cannot subsequently decree its specific performance.² So, time is held essential, whenever it materially affects the benefit to be derived from the consideration or the conveyance.³ Thus, time is, to a great extent, of the essence of a contract entered into with an *ecclesiastical corporation*. Therefore, where the plaintiff agreed to take a concurrent lease of a dean and chapter, and to pay the fine in January, but was not ready with the money in March following; a bill filed by him for a specific performance was dismissed with costs.⁴ So, where the subject of contract was *a life annuity*, and the defendant insisted that time was of the essence of the contract, a motion for reference to the master upon the title was refused.⁵ So, if a contract relate to *wild and uncultivated lands*, where the principal value is timber, time may be of the essence of the contract.⁶ So, the distinction between *conditions precedent and subsequent* is ap-

¹ Doloret v. Rothschild, 1 Sim. & Stu. 590; Hipwell v. Knight, 1 You. & Coll. 419; Westerman v. Means, 12 Penn. 97; Page v. Hughes, 2 B. Mon. 441; Nodine v. Greenfield, 7 Paige, 544.

² Dominick v. Michael, 4 Sandf. 374.

³ Kirby v. Harrison, 2 Ohio (N. S.) 326.

⁴ Carter v. Ely, 7 Sim. 211.

⁵ Withy v. Cottle, Turn. & Russ. 78.

⁶ Rogers v. Saunders, 16 Maine, 92. See Boults v. Mitchell, 15 Penn. 371.

ties, the right to a specific performance may depend upon it; and the same doctrine prevails in the Court of the United States. Garnett v. Macon, 6 Call. 308.

plicable to the question of time. The rule is, that equity cannot relieve from the consequences of a condition precedent, unperformed. But, upon breach of a condition subsequent, which would work a forfeiture or divest an estate, equity, acting upon the principle of compensation, will interpose, and prevent the forfeiture or divestment, provided it can be given with certainty in damages. Thus, the defendant sold to the plaintiff a lot of land. By an agreement under the hands and seals of the parties, the plaintiff covenanted to build within a certain time, and give a bond and mortgage for a part of the price, and pay the balance or give a bond and mortgage for the whole by a specified day; and the defendant covenanted to give a deed on this day. There was also a clause, expressly showing that the agreement was in all respects to be void, provided the plaintiff failed to perform any one of the covenants. He entered, but, from untoward circumstances, and not from any act on the part of the defendant, was not ready with his money or the bond and mortgage on the day specified; but made a tender on the next day. Held, a condition precedent, and that the Court could not relieve.¹ So, although where a contract has become invalid at law by lapse of time, equity will grant relief, if time is not of the essence of the contract; yet, where the plaintiff has unjustifiably omitted to execute his part of the contract by the time appointed, and the defendant has not by his acts acquiesced in that delay, the Court will not compel specific performance. Nor will they do it, where the remedies are not mutual, and where the party who is not bound lies by for the purpose of seeing whether it will be a gainful or a losing bargain, and thus determining whether to abandon or enforce it.² So, time will be of the essence of a contract to convey, where the parties declare the forfeiture of the contract, in case payments are not made according to its terms. Nor will the Court relieve from a

¹ Wells v. Smith, 2 Edw. 78.

² Rogers v. Saunders, 16 Maine, 92;

Shuffleton v. Jenkins, 1 Morris, 427;

Scott v. Fields, 8 Ohio, 92.

forfeiture or a penalty to be incurred by the failing party ; as where the vendee agreed to forfeit the first payment and the contract, in case he did not make the others at the times stipulated.¹ So, where a bond is given to convey land, if a certain sum is paid by a particular day ; unless the money is paid at that day, the bond cannot be enforced.² So, after seven years, the Court will refuse to decree specific performance of a contract, in the part execution of which the complainants, or those under whom they claim, have expended large sums of money, although the first default was on the part of the defendant, and such failure probably prevented an execution on the part of the complainants ; circumstances having so changed, that neither party could derive the anticipated benefits from an execution of the contract.³ So, though time may not be made, by the terms of the contract, of the essence thereof ; it may be by the conduct of parties, or subsequent circumstances ; and, in such case, the party in default cannot demand specific execution.⁴ So, a motion for an injunction, to restrain an action against an auctioneer for the deposit, was refused, where there had been great delay on the part of the vendor.⁵ So, a bill, for specific performance of articles for the purchase of an estate, was dismissed with costs ; because the title was not laid before the vendee's counsel within the time limited.⁶ So, upon sale of a reversion, part of the terms was, that the purchase-money be paid by a certain time ; not being so, by default of the vendee, the vendor was discharged from his contract.⁷ So, where there was a proposal to sell a lot of land for a certain price, provided the vendee came to close the trade within two weeks from a certain day ; and he came at 40 minutes before 12 o'clock at night, when the vendor was abed and asleep, and half a mile distant from his place of business ;

¹ *Scott v. Fields*, 8 Ohio, 92.

² *Shuffleton v. Jenkins*, 1 Morris, 427.

³ *Pratt v. Carroll*, 8 Cranch, 471.

⁴ *Jackson v. Ligon*, 3 Leigh, 161.

⁵ *Radcliffe v. Warrington*, 12 Ves.

326 ; *Lloyd v. Collett*, 4 Bro. 469 ; 4 Ves. 689, n.

⁶ *Lewis v. Lord Lechmere*, 10 Mod. 503.

⁷ *Newman v. Rogers*, 4 Bro. C. C. 391.

held, the latter was not bound.¹ So, where a contract for the sale of a city lot provided, that the purchaser should, on or before a particular day, build and inclose a house upon the front of the lot, or in lieu thereof on that day pay \$1,000 towards the purchase-money; also, if he neglected or failed to perform any of the covenants therein contained at the times limited, all his right or interest in the premises, either in law or equity, should cease; held, the parties had made the payment at the day an essential part of the contract; and the vendee, who had not attempted to build the house, and had without any legal excuse failed to make the payment at the time specified, was not entitled to a decree for specific performance.² So, where agreement was to be void, if the purchaser's counsel should be of opinion, that a marketable title could not be made by a certain time; the counsel being of that opinion, a bill by the purchaser for a specific performance, with a compensation, was dismissed, with costs; and an application, afterwards made by the plaintiff, that his deposit might be set off against the defendant's costs, and the surplus (if any) paid to him, was refused, with costs.³ So, specific performance will not be enforced against the vendor, where the vendee has neglected to comply with the conditions within the time limited, and the vendor has, in consequence, sold and conveyed to another purchaser. So, specific performance will not be enforced against a subsequent purchaser, for valuable consideration, without notice, who has acquired the legal title; especially in favor of a vendee, who has failed to comply with his own contract, within the time limited.⁴ So, where the payment of purchase-money, secured by a bond, was subject to the condition, that A., or his legal representative, or attorney, should on or before a certain day execute to the obligor a release for a certain portion of the land sold; and, if the same could not be procured, then a deduction to be

¹ *Curtis v. Blair*, 26 Miss. 309.

² *Wells v. Smith*, 7 Paige, 22.

³ *Williams v. Edwards*, 2 Sim. 78.

⁴ *Doan v. Gibbs*, 1 Bai. Eq. 371.

made for that portion, at a certain rate per acre ; held, that time was of the essence of the contract, and, as the release was not executed within the time, the stipulated deduction must be made.¹ So, a vendor is not bound to tender a deed and demand payment, except for the purpose of enabling him to affirm the contract, and to recover the purchase-money in a suit at law. And where the payment at a particular day is made an essential part of the contract, the vendee, in order to obtain specific performance, must tender or offer the money at the time specified, upon the receipt of a deed.² So, where one contracts to convey land to another, on a certain day, in fee simple, and free from incumbrance, or pay a certain sum ; and on that day has not a perfect title ; the vendee may recover such sum without any tender of the money or of security for it.³ So, if a vendee agrees to pay the price within a certain time, in consideration of which payment he is to receive a deed ; he cannot at law entitle himself to such deed, by making a tender after the time.⁴ So, where, in a contract to buy and sell on a particular day, each promise is the sole consideration of the other ; neither party can maintain an action, without alleging a readiness to perform on that day, or an excuse for the want of it, caused by the act of the defendant.⁵ So, where the defendant agreed to let to the plaintiff a store, upon his procuring one A. as surety for the rent before a certain day, which the plaintiff failed to do ; held, the plaintiff could not have a decree for specific performance nor an injunction.⁶ So, if one who has bound himself to execute a title to land as soon as he can obtain it, neglects for more than two years to attempt to obtain such title ; this is a breach of the bond, unless he proves reasonable diligence to procure the title.⁷ So, where a bond was given to make title to land, the

¹ *Westerman v. Means*, 12 Penn. 97.

² *Wells v. Smith*, 7 Paige, 22.

³ *Holmes v. Holmes*, 12 Barb. 137.

⁴ *Hill v. Fisher*, 34 Maine, 143.

⁵ *Perry v. Wheeler*, 24 Verm. 286.

⁶ *Mitchell v. Wilson*, 4 Edw. Ch. 697.

⁷ *Garnett v. Yoe*, 17 Ala. 74.

title to which appeared by the bond to be in a third person ; and the obligee lived for three years, during which the obligor acquired no title, nor attempted to do it ; held, the delay was an unreasonable one, and a forfeiture of the bond ; and the administrator of the obligee was the proper party to bring a suit upon it.¹ So, though no time is fixed, or time is not essential, the vendor cannot trifle with the purchaser by needless delay. But the latter, not capriciously, or with a design to surprise, may fix a reasonable time for the conveyance ; after which he shall rescind the contract.² So, where there was a sale of land, the purchaser agreeing to pay \$100 therefor by instalments, upon payment of which the seller agreed to convey ; but, on failure of payment, might reënter ; and all the payments fell due, but none were made ; and, on application of the purchaser, the time was extended ; but no payment being then made, the seller gave the purchaser notice to quit ; held, he had a right to rescind the contract, and by so doing had terminated all the right of the purchaser in the premises.³ So, where one party to an agreement trifles, or shows a backwardness in performing his part of it, equity will not decree a specific performance in his favor ; especially if the circumstances and situation of the other party are materially altered in the mean time.⁴ Thus, specific performance was refused, on the laches and trifling conduct of the plaintiff ; the contract being for a sale to the plaintiff, under a bankruptcy, of a reversionary interest for life ; which in the interval fell into possession. The defendants having also been in some degree remiss, the bill was dismissed without costs, upon delivering up the agreement.⁵

2. A. was proprietor of four parts in seven of the manor of Glaston. B. treated with C., who was empowered to

¹ Allen v. Greene, 19 Ala. 34.

² Thompson v. Dniles, 5 Rich. Eq. S. C. 5 Vin. Abr. 538.

370.

³ Barney v. Loper, 16 Barb. 629.

⁴ Hayes v. Caryll, 1 Bro. P. C. 126 ;

⁵ Spurrier v. Hancock, 4 Ves. 145.

sell this manor or part of it, and in 1697 contracted with him in writing. B. lived eight years afterwards, and during that time was several times requested by C. to complete the bargain, and pay the purchase-money, but B. raised objections to the title, and would not proceed further in his purchase until they were cleared. But it appeared that those scruples were only to shuffle off payment until, by the dropping of some lives, his bargain would be bettered. One life dropped in C.'s life, and two since. The plaintiff, after his father's death, in 1706, exhibited his bill for specific performance. Dismissed, with costs.¹

3. A bill for specific performance of an agreement to take a lease, for forty-two years, of iron and coal mines and machinery, for the purpose of trade, was dismissed, on account of delay on the part of the lessor to make out his title, and to give possession at the time stipulated.²

4. In an agreement, by a tenant at will of a public-house, for the sale of the possession, trade, and good-will of the house, at a fixed sum, and the stock and furniture at a valuation, one of the terms being, that possession should be taken and the money paid on a certain day, time was held of the essence of the contract; and a purchaser, who was not in a condition to fulfil his part of the contract on that day, cannot compel a specific performance, though he was ready on the following day. (It was doubted, however, whether a Court of Equity will enforce the performance of a contract for the purchase of a subject-matter, of which the good-will of a public-house, unconnected with any fixed interest in the premises, forms the principal part.³)

5. An estate was sold by auction, the purchase to be completed in two months. The buyer died soon afterwards, and suits were instituted, both in the Spiritual Court and the Court of Chancery, respecting his affairs, which prevented the completion of the contract. Four or five years

¹ Coward v. Odingsale, 2 Eq. Ca. Abr. 688, pl. 5.

² Parker v. Frith, 1 Sim. & Stu. 199.

³ Coslake v. Till, 1 Russ. 376.

after the sale, the vendor filed his bill to have the contract rescinded. The affairs of the buyer still remaining unsettled, the Court rescinded the contract, and gave the plaintiff his costs out of the deposit.¹

6. In May, 1837, the defendant, being about to raise his dam to a height that would overflow part of the farm of the plaintiff, agreed to buy his land, and to pay for it on the 1st of April, 1838, when the deed was to be delivered. It was further agreed, that, as a compensation for damages the plaintiff might sustain previous to the conveyance, he should use and occupy certain lands of the defendant. In the fall of 1837, the defendant raised his dam, and the plaintiff took possession of the lands. In October, 1838, the plaintiff tendered his deed, but the defendant did not pay, and the deed was not delivered. In 1844, the plaintiff filed his bill, praying that the defendant might be decreed to pay by a day to be fixed; otherwise the agreement to be cancelled, and the defendant directed to lower his dam. Ordered, that the defendant pay by a day fixed, or that the agreement be cancelled; but an order to lower the dam was denied.²

7. Agreement in March, 1810, to purchase a farm, and to pay \$250 in one year, one third of the residue in two years, and the other two thirds in two successive years. On receiving the payments, the vendor to give a deed; upon failure in the payments or either of them, the agreement to be void. The vendee took possession, and made improvements, but made no payments; and the vendor, in October, 1813, supposing the agreement void or abandoned, sold the farm to a third person. The vendee files a bill in 1814, on a tender of the whole purchase-money, for specific performance. Bill dismissed, with costs.³

8. Parol agreement, in December, 1833, for the purchase of lands, which the vendor was to purchase of an Indian reserve. Under the contract, the vendor received a horse

¹ Mackreth v. Marlar, 1 Cox, 259.

³ Benedict v. Lynch, 1 Johns. Ch.

² Stevens v. Ryerson, 2 Halst. Ch. 477. 370.

valued at \$100, and was also to receive \$100 in December, 1834, 1835, and 1836, respectively. After the vendor purchased, the vendee entered and made improvements, but made no offer of payment, until January or February, 1835, (except an offer of the notes of a third person, due several years after the agreement was made;) and the contract, as disclosed by the bill, was uncertain and contradictory, and altogether disproved by the answer and proof. Held, a bill for specific performance, brought by the vendee, should be dismissed, with costs; but without prejudice to an action at law, or suit in equity, to recover back money or property delivered upon the faith of the agreement.¹

9. There is, however, a class of cases, which hold the doctrine, that the time, at which a contract is to be performed, is not essential in equity, as at law;² (a) unless the parties have expressly agreed that it should be so regarded, or unless it follows from the nature and purposes of the contract,³ and that relief against the lapse of time is in the discretion of the Court, upon the circumstances.⁴ Thus, upon a bill in equity, to enforce specific execution of a contract to convey lands, if the complainant has made large and valuable improvements, with the knowledge and acquiescence of the defendant, the Court will decree specific execution, upon payment of the agreed price with interest, although payment has been delayed for an unreasonable time.⁵ So, the execution, by the vendor, of a mortgage on the premises, after the agreement to sell, is not a ground to avoid the contract, provided it be removed before he is called on to make title, or, at least, before the bill for specific execution is filed.⁶ So, although a purchaser of an estate in fee will not be compelled to take a

¹ *Goodwin v. Lyon*, 4 Port. Eq. 297.

⁴ *Wells v. Wells*, 3 Ired. 596.

² *Radeliffe v. Warrington*, 12 Ves.

⁵ *Mason v. Wallace*, 4 McLean, 77.

376; *Harrington v. Wheeler*, 4 Ves.

(See p. 191.)

686; *Hearne v. Tenant*, 13 Ves. 287.

⁶ *Tiernan v. Roland*, 15 Penn. 429.

³ *Jones v. Robbins*, 29 Maine, 351.

(a) It will be seen, that in some cases the same principle has been adopted by courts of law.

life-estate only, nor an estate in which the vendor had no interest, as owner, at the time of sale ; yet, where the seller has an equitable estate under articles of agreement, and a right to acquire the legal title, and actually acquires it, after the sale, but before any laches can properly be imputed to him, he may compel a specific performance.¹ So, merely undertaking to deliver an abstract and possession at a particular time does not make it of the essence of a contract.² So, where a vendee agrees to pay the vendor the balance of the price, on his executing a bond to complete the title, and cause a conveyance to be made ; time is not of the essence of such a contract. Nor is it a defence to an action on the agreement, that the bond was not tendered to the obligee, till two years after the time when the money was to be paid by him.³ So, specific performance will be decreed, where the vendee tenders the whole purchase-money at the time the second instalment falls due, though he failed to pay the first instalment at the proper time.⁴ So, the fact, that the vendor has suffered the purchaser to remain in possession, and received payments from him, from time to time, down to a short period previous to the filing of a bill by the purchaser for specific performance, is strong evidence that neither party intended to make the time an essential part of the contract ; and the vendor will not be allowed to insist upon a forfeiture, on that ground. So, although he is unable to make a title to the whole of the land, he will be required to perform his contract, so far as it can be performed, notwithstanding the lapse of time, unless he has been prejudiced by the delay.⁵ So, though the vendor does not produce his deeds, or tender a conveyance, within the time limited by the articles, the Court will still decree a sale.⁶ So, a lapse of twenty-one days, from the time allowed to a lessee to purchase a lot, does not forfeit his right ; a reasonable excuse being given for such

¹ *Tiernan v. Roland*, 15 Penn. 429.

² *Boehm v. Wood*, 1 Jac. & Walk. 419.

³ *Willett v. Clarke*, 10 Price, 207.

⁴ *Gibbs v. Champion*, 3 Ham. 335.

⁵ *Voorhees v. De Meyer*, 2 Barb. 37.

⁶ *Gibson v. Patterson*, 1 Atk. 12.

delay, viz., the death of the obligee, the refusal of the administrator to receive the purchase-money, and non-residence of some, and infancy of others of the heirs.¹ So, where possession has been taken, and valuable improvements made, the acquiescence of the vendor may be presumed; and a delay of payment for two years, under such circumstances, where the vendor sustains no damage, which interest will not compensate, will not bar a bill for specific execution.² So specific performance of an agreement for the sale of an annuity, to commence from the date of the agreement, and to continue for three lives, to be named by the grantee, was decreed, where the lives had not been named, the delay having been occasioned by the grantor.³ So, by the terms of an auction sale, the title-deeds were to be produced by a certain day, and were not then ready, but the purchaser received them afterwards, without objection. Held, he could not afterwards, on disliking the title, object to the delay.⁴ So, where, by the terms of an auction, the sale is to be completed by a certain day; yet, if neither party takes any step to quicken the other, till it becomes impossible to execute the agreement by the day; the time is waived, and equity will interfere, to prevent the purchaser from taking advantage of it at law.⁵

10. By the terms of a sale, the purchaser was to pay part of the price on signing the agreement, and the rest on completion of the purchase "on the 11th of October, from which time the purchaser was to be entitled to the rents and profits," but if the purchase should not be completed by the 11th of October, he should pay interest until such completion. The vendor to deliver an abstract of title within fourteen days from the sale, and deduce a good title. The sale was on July 9th, and the abstract delivered on the 14th. It then appeared, that there were two mortgages on the estate, and the mortgagees had not received the usual six months' notice of

¹ Page v. Hughes, 2 B. Mon. 441.

² Mason v. Wallace, 3 M'L. 148. 396.
(See p. 189.)

³ Pritchard v. Ovey, 1 Jac. & Walk.

⁴ Smith v. Burnham, 2 Anstr. 527.

⁵ Jones v. Price, 3 Anstr. 924.

redemption; that some of them were dead, and letters of administration *de bonis non* were requisite in the case of one of them; also that a deed of declaration of trust by parties beneficially interested in the mortgage was required. For these and other causes, a conveyance could not be made by the 11th of October, and the purchase was completed in the following April. Held, the vendor did deduce an abstract, and show a good title.¹

11. So a delay, amounting to apparent negligence, may be explained; and, under special circumstances, as where there is a difficulty about the title, presents no bar to relief. Bill for specific performance. The defendant, in 1822, agrees with the plaintiff to sell him certain real estate for \$600, "to be paid in one year, upon receiving a good title." The plaintiff enters, but is soon after ousted of part of the premises by one claiming under an adverse title; upon which the defendant brings ejectment against the latter; and the contract remains unexecuted until 1829, when the plaintiff tenders the money to the defendant, and demands a deed. Held, the plaintiff was not barred by mere lapse of time.² So, A. contracts for the purchase of an estate, and is let into possession. The estate being greatly incumbered, A. pays off some of the incumbrances. Great delay is used on the part of the vendor in clearing other incumbrances, and making good the title. Held, the purchaser shall not for that reason be discharged from his contract.³

12. The owner of land made a written agreement to sell it for \$300, one third to be paid down, and the residue in one and two years, with interest; possession to be delivered immediately; and, if the purchaser should make default in either of the payments, the vendor to be discharged, and the purchaser to forfeit all previous payments, and deliver up possession. The vendee took possession, made valuable improvements, and paid the first two instalments at the times

¹ Savory v. Underwood, 28 Eng. Law & Eq. 152.

² King v. Morford, 1 Saxt. Ch. 274.

³ Smith v. Dolman, 6 Bro. P. C. 291.

specified. He then assigned his contract to the complainant, who took possession, but did not make the last payment at the day specified; nor was he called on for payment, nor did he offer a conveyance upon payment; but, a few days afterwards, he tendered the money, and demanded a conveyance. Held, time was not of the essence of the contract, and the complainant was entitled to specific performance.¹

13. Nor will the circumstance, that, at the time of filing a bill for specific performance, the vendor is unable to make a title to *the whole* of the land sold, relieve him from a performance of his contract, *so far as it can be performed*, any more than it would have done at the time the purchase-money became due; unless something has occurred since that time, by reason of the purchaser's delay, which has placed the vendor in a worse situation than he would have been in, had he been called upon to perform his contract at the time stipulated.²

14. The same principle, that time is not of the essence of the contract, has also received other applications. Thus if, on a bill for specific performance by the vendor, a good title can be made before or when *the cause comes on upon further directions*, specific performance will be decreed. So, if a title is procured before the report, or before the final decree;³ more especially where no injury has arisen from the delay.⁴ So, where the parties have not made time of the essence of the contract, and the delay is not the fault of the vendor, but is occasioned by the state of the title, unknown at the sale; the invariable inquiry of the Chancellor is, whether the vendor is able to convey *at the hearing*.⁵ So, a purchaser cannot insist on being discharged upon a report of defective title, if capable of being made good within a reasonable time; as to which the vendor will be

¹ Edgerton v. Peckham, 11 Paige, 352.

² Voorhees v. De Meyer, 2 Barb. 37.

³ Paton v. Rogers, 6 Madd. 256;
Mortlock v. Buller, 10 Ves. 292; Ben-

net, &c. v. Carey, 3 Brown Ch. 390;
Hepburn v. Auld, 5 Cranch, 262.

⁴ Dutch, &c. v. Mott, 7 Paige, 78. But
see Nodine v. Greenfield, 7 Paige, 545.

⁵ Cotton v. Ward, 3 Monr. 313.

put under terms.¹ Thus, in some cases, the vendee may claim costs, if not himself in fault.² And the purchaser may claim interest upon the purchase-money paid, from the time of demanding a deed.³ So, relief is granted against forfeiture of the deposit, upon putting the other party in the same position, as if the contract had been performed at the time agreed.⁴ So, specific performance was decreed; the abstract, though delivered very late, and under a notice that the vendee would insist on his deposit, with interest, if the title should not be made out, and possession delivered, by the time of payment, having been received and kept without objection; and the vendee, upon the construction and the circumstances, not being entitled to insist on time as the essence of the contract. So, where the vendor declines executing the contract, upon the ground that he is unable to give a good title, and the purchaser files his bill for specific performance, or to rescind, if the defendant is able to give a good title at the time of the decree, the complainant will be compelled to accept it.⁵ But though, in general, the vendor may compel specific performance if able to make a title at the hearing; yet, where he is bound by the contract to convey immediately, but asks for an injunction against any transfer of the defendant's property, by which he was to be paid, or for a receiver of such property; he must show that he has a present ability to fulfil the contract; not merely that he may possibly be able to perform at the hearing.⁶

15. Upon a bill filed by a vendor for specific performance, it appeared that he could make a good title before the commencement of suit, but did not show a good title to the purchaser until afterwards. Specific performance decreed, but the purchaser to recover costs.⁷

16. Agreement between vendor and purchaser, that the

¹ Coffin v. Cooper, 14 Ves. 205.

² Dutch, &c. v. Mott, 7 Paige, 78.

³ Pierce v. Nichols, 1 Paige, 244.

⁴ Moss v. Matthews, 3 Ves. 279.

⁵ Seton v. Slade, 7 Ves. 265; Cotton v. Ward, 3 Monr. 304, 313.

⁶ Baldwin v. Salter, 8 Paige, 473.

⁷ Townshend v. Champenowne, 3 Y. & Coll. 505.

purchaser should be entitled to the rents on the 1st May, 1813, or from such time as the purchase should be completed. An abstract of title was afterwards furnished to the purchaser, and the title appeared to be satisfactory to him; and in May, 1816, he sent the vendor a draft conveyance for his approval, which was returned, approved, in July, 1816. Afterwards, the purchaser, on the suggestion of counsel, made several objections to the title, and delayed completing the purchase. In November, 1817, the vendor filed his bill for specific performance, and the master found, that the vendor could make a good title before the bill was filed, but did not show a good title to the purchaser till the 20th January, 1825. Held, upon a decree for specific performance, that the proper date of the conveyance was the 20th January, 1825.¹

17. Though equity will decree specific performance of a contract for the sale of land, if the vendor is able to make a good title at any time before decree; the dismissal of the bill is a bar to a new bill for the same object.²

18. The inability of the vendor to make a good title, at the time of decree, though a sufficient ground for refusing a specific performance, will not authorize a Court of Equity to rescind the agreement, where the parties have an adequate remedy at law for its breach.³

19. Where the report is in favor of the title, the Court, on allowing exceptions to it, will give the vendor a reasonable time to remove the objection, although the exceptions and further directions were set down to come on together.⁴

20. All objections to a title were to be taken within twenty-one days from delivery of the abstract, or to be deemed waived, and time was, in that respect, to be considered the essence of the contract. Held, that the twenty-one days did not begin to run, until a perfect abstract had been delivered.⁵

¹ *Townshend v. Champenowne*, 3 Y. & Coll. 505.

² *Hepburn v. Dunlap*, 1 Wheat. 179.

³ *Ibid.*

⁴ *Portman v. Mill*, 1 Russ. & Myl. 696.

⁵ *Hobson v. Bell*, 2 Beav. 17.

21. Although time was originally an essential part of the contract, it may become unessential by the subsequent conduct of the parties. (a) Thus the neglect of the obligee in a bond for conveyance, to pay an instalment at the time agreed, does not cause a forfeiture, if the obligor has not regarded time as of the essence of the contract; and a subsequent receipt of payment is a waiver of any forfeiture for this cause.¹ So, the delay of one party in fulfilling a contract affords no ground for equity to relieve the other from the consequences of the delay, where the latter has assented to and acquiesced in such delay.² So, a defendant may plead, that, by a subsequent agreement, not under seal, made before breach, the time for deducing title had been enlarged, and that he was ready to deduce it within the enlarged time. So, that, in consideration the defendant would deduce a good title and convey, (after breach,) the plaintiff agreed to accept such title and conveyance at a later day.³ So, it has

¹ *Linscott v. Buck*, 33 Maine, 530; ³ *Rippingall v. Lloyd*, 2 Nev. & M. Hudson v. Bartram, 3 Madd. 440. 410.

² *Sloo v. Law*, 1 Blatch. 512.

(a) It is said, time may be of the essence of the contract in equity. Exact punctuality may be of great importance to the interests of a contracting party in many situations. In some, it is obvious from the state of the property and other circumstances. In others, we do not doubt that the instrument may be so framed as to show that it is a substantial part of the contract. In those cases, the Court can no more dispense with it than any other vital provision. But the parties themselves may; and it is in that sense true that time is not essential, but immaterial, when comparing its effect in that court with that at law.

Default in respect to time is not a bar of itself, except in peculiar cases; but is only evidence with other things of abandonment, and, of course, may be rebutted. Time may in all cases be made essential, but where it is, it does not follow that it is necessarily conclusive in equity, as it is at law. In equity, time may be waived by a party, as may any other stipulation introduced for his benefit. A failure to avail himself of it, on the first fit occasion, and before or when the other party begins, after a default, to act again on the agreement, may amount to such waiver. *Falls v. Carpenter*, 1 Dev. & Batt. Eq. 277.

been sometimes held, that the time of performance of the condition of a bond may be enlarged by a *parol* agreement. Thus, where certain acts were done by the obligor, amounting to a substantial, though not literal performance; held, that evidence was admissible of a *parol* agreement of the obligee, to waive any further performance.¹ So, specific performance of an agreement to purchase may be decreed, after considerable delay; if the vendee has not demanded his deposit, or shown a determination not to proceed.²

22. The plaintiff, on the 26th of April, agreed to purchase a manor from the defendant, to complete the purchase according to certain conditions, and, upon the purchase taking place, to sign an agreement for payment of the purchase-money on or before the 24th of July. It was also agreed, that, on completion of the purchase, the purchaser should be entitled to the rents and profits of such parts of the estate as were let, from the 24th of June. The day of completing the purchase was, for the convenience of the purchaser, altered from the 24th of June to the 24th of July. A tenant of a copyhold parcel of the manor having died seised thereof in 1836, the admittance of the parties entitled to be admitted was postponed from time to time, at their request, and did not take place till the 1st of July, and in December the fine was paid to the defendant. The conveyance of the manor was executed in August, and the purchase money paid in the following September. Held, an action for money had and received could not be maintained to recover the fine.³

23. If the purchaser demand his deposit at the day, and the vendor has not delivered his abstract, and also neglects to deliver it, until after an action brought for the deposit; this is evidence of an abandonment of the contract by the

¹ Fleming v. Gilbert, 3 Johns. 358 ;
Keating v. Price, 1 Johns. Cas. 22 ;
Erwin v. Saunders, 1 Cow. 250.

² Pincker v. Curteis, 4 Bro. 329.
³ Lord Hardwicke v. Lord Sandys, 12
Mees. & Wels. 761.

vendor; who shall not be entitled afterwards to a specific performance.¹

24. Where a person had contracted for the purchase of an estate from trustees, under a deed of release and assignment for the benefit of the creditors of a trader, upon a stipulation that a good title should be made by a given day, and that day fell within the period, during which a fiat in bankruptcy might have issued against the trader; held, he was in the situation of a purchaser, who had waived a stipulation, that time should be of the essence of the contract.²

25. Agreement for sale of real property. If the residue of the purchase-money is not paid by a certain day, the agreement shall be void; and the vendors may resell. The money is not paid on the day, but the purchaser retains possession, giving a warrant of attorney to confess judgment in ejectment. The stipulation as to time is waived.³

26. A vendor and vendee proceeded in the treaty beyond the time for completing the contract. The vendor having brought an action, and withdrawn his record, not having got in a judgment amounting to half the purchase-money; the Court refused an injunction.⁴

27. A. articles to buy land, and pays part of the purchase-money; afterwards, he enters into several orders of Court, to pay the residue by such a day, and, in default thereof, to give up the articles, and lose what he had before paid. The Court will relieve, though these orders have not been complied with.⁵

28. Assumpsit. The declaration alleged, that the plaintiff was possessed of a house, &c., for the residue of a term of six years, and agreed to assign the lease to the defendant at a certain price, and give possession on a certain day; and averred, that she was, from the time of making the agree-

¹ Lloyd v. Collett, 4 Bro. 469.

² Hipwell v. Knight, 1 You. & C. 419.

³ Ex parte Gardner, 4 You. & Coll.
503.

⁴ Wood v. Bernal, 19 Ves. 220.

⁵ Vernon v. Stephens, 2 P. Wms. 66.

ment, ready and willing to assign her interest in the house, &c. The defendant, in his pleas, traversed this readiness and willingness. The greater part of the house was destroyed by fire shortly after the agreement, and before the time for its completion. The agreement provided, that either party making default should pay the other £500 as liquidated damages. After the making of the agreement, but before the day for its completion, the parties agreed, by an indorsement, to enlarge the time for a few days. Held, this amounted to a fresh agreement.¹

29. Contract for the sale of houses ; which, from defects in the title, could not be completed on the day. The treaty, however, proceeded, upon a proposal to waive the objections on certain terms. The houses being burnt before a conveyance, the purchaser is bound, if he accepted the title ; although the vendor suffered the insurance to expire, at the day on which the contract was originally to have been completed, without notice. A reference to the master was therefore directed to inquire, whether the proposal was accepted or acquiesced in on behalf of the purchaser.²

30. Where a vendee of land, incumbered by mortgage and judgment, promised in writing to pay one of the vendor's creditors, by a certain day ; held, a subsequent parol agreement, pointing out the mode in which the title should be secured to the vendee, and in effect carrying the contract into execution, but postponing the day of the creditor's payment, was no variance of the original agreement.³

31. Conditions of sale stipulated, that the sale should be completed on a certain day ; that objections to the title, not made within twenty-one days from delivery of the abstract, should be considered as waived ; and that, if the purchaser should not comply with the conditions, his deposit should be

¹ Bacon v. Simpson, 3 Mees. & Wels. 78.

³ Reed v. Chambers, 6 Gill & Johns. 490.

² Paine v. Meller, 6 Ves. 349.

forfeited, and the vendor be at liberty to resell. The purchaser did not deliver his objections, until several weeks after the twenty-one days, and after the day appointed for completing the purchase. The vendor's solicitor, however, received them, and entered into a long correspondence with the purchaser on the subject of them, but without coming to a satisfactory conclusion. Finally, the vendor, against the purchaser's objection, resold the property (but at a less price) to one who, some months before the suit, had notice of the first sale. About six months afterwards, he filed his bill against the two purchasers and the auctioneer. The Court held, that the conditions had been waived by the solicitor, and decreed specific performance, with a reference to the master, as to title; but dismissed the bill, with costs, as against the auctioneer, who denied that he had ever intended to part with the deposit; and without costs, as against the second purchaser, who claimed the benefit of his contract, if the Court should refuse to enforce the plaintiff's.¹

32. But, on the other hand, it is said, although courts of equity have sometimes interfered in favor of parties, who were not ready to perform their agreement at the day, where the time appeared not essential, yet, when a further indulgence is granted, it should only be in extreme cases, where a party has failed through some unforeseen accident; or where there is something indicating a waiver of the objection by the other party. It is for the parties themselves to settle the terms of their agreement; and courts have no power to determine which of those terms are, and which are not, material. A new agreement, extending the time for the performance of a contract, is evidence that the parties to such contract deemed the time material.² So it has been held, that parol evidence is not admissible, to enlarge the time, within which the terms of a written agreement for the sale

¹ *Cutts v. Thodey*, 13 Sim. 206.

² *Wiswall v. McGowa*, 2 Barb. 270.

of land were to be complied with.¹ So, also, that the day provided for completion of the purchase, in a written contract, cannot be waived by oral agreement, and another day substituted in its place.²

33. On a bill for specific performance, the questions, whether time was originally of the essence of the contract, and whether, being so, the defendant has by any act, waived it as a ground of objection to the performance, are questions depending on evidence, and not to be decided except upon the hearing.³

34. Where an agreement in writing is to be performed on a certain day, and the parties agree to enlarge the time, a declaration on the day stated in the agreement, though the evidence is of a different day, will support the action.⁴

35. In many cases, *notice* from one party to the other, or the want of it, determines the effect of lapse of time upon the contract. Thus, a vendor, having notice from the purchaser that he abandoned his contract, did not file his bill for specific performance, till about a year afterwards. The bill was dismissed.⁵ So, where time is not of the essence of the contract, and there is unnecessary delay by one of the parties in completing, the other has a right, by *notice*, to limit the time, and upon default to abandon the contract.⁶ But the time may be waived, by proceeding in the purchase, after the expiration of the time fixed by the notice.⁷ So, a party who covenants to convey is not in default, until the other party has demanded a conveyance, and, after waiting a reasonable time to have it drawn and executed, unless such demand was absolutely refused, has again demanded it.⁸ This is a rule not of *pleading*, but of *evidence*.⁹

36. A bill by a lessee, for specific performance of an agreement for a lease, was dismissed, because it was not filed,

¹ Doar v. Gibbes, 1 Bailey, Eq. 371.

² Stowell v. Robinson, 3 Bing. N. C. 928.

³ Levy v. Lindo, 3 Mer. 81.

⁴ Thresh v. Rake, 1 Esp. N. P. C. 53.

⁵ Watson v. Reid, 1 Rus. & Myl. 236.

⁶ Taylor v. Brown, 2 Beav. 180.

⁷ King v. Wilson, 6 Beav. 124.

⁸ Lutweller v. Lumell, 12 Barb. 512.

⁹ Pearsoll v. Frazer, 14 Barb. 514.

until more than two years after the defendant had given notice to the plaintiff, of his intention not to perform the contract, on account of the latter not having fulfilled it on his part.¹

37. Bill for specific performance. The plaintiff agreed to take a house of the defendant for two years. Afterwards, on the 4th of September, 1817, he agreed to buy it for £25 paid down, and £425 to be paid on the 25th of December, on or before which time, the conveyance was to be executed. An abstract was delivered on the 20th of October, and afterwards, a draft of the conveyance, with the abstract, sent to the plaintiff, with a note of the defendant's solicitor, stating that the deeds were with him, and desiring to hear from the plaintiff if any objections occurred; and many ineffectual applications were made to see the plaintiff. A notice was served on the plaintiff on the 22d of December, that the defendant would, on the 23d, 24th, and 26th, attend at the plaintiff's house, to execute the conveyance, and, on default, he should consider the plaintiff as refusing to proceed in the purchase, and act accordingly. On the 2d of April, 1818, the plaintiff returned the abstract, with objections to the title. On the 13th, the defendant distrained on the plaintiff for rent. The plaintiff then filed this bill. Held, the defendant should have given notice that he considered the agreement as at an end, and returned the £25; and, he not having done so, the Court directed the usual reference as to the title.²

38. Where a vendor covenants to deduce a good title at A., B., or C., on or before a certain day, a plea, that he was ready to deduce a good title at that time, without averring notice to the covenantee, at which place he would be ready, is insufficient. So a plea, that, by a subsequent agreement not under seal, made before breach, the time had been enlarged, and that the defendant was ready within the enlarged time. So, a plea, that, in consideration the defendant would deduce a good title and convey, (after breach,) the

¹ *Heaphy v. Hill*, 2 Sim. & Stu. 29.

² *Reynolds v. Nelson*, 6 Madd. 18.

plaintiff agreed to accept such title and conveyance at a later day.¹

39. The defendant agreed to sell his interest in a public-house to the plaintiff, &c., at an appraisement; payment, on taking possession, which was to be on or before a certain day. The plaintiff paid a deposit; to be forfeited, if he should not complete his part of the agreement. The parties appointed A. and B. to be appraisers, respectively, as agreed. On the day appointed for executing the contract, A. and B. met, but A., the seller's appraiser, was informed, that B. could not conveniently on that day complete the valuation, but would do it the next day; and no objection was then made to the delay. B. went to the seller's premises the following day, to make the valuation, but the seller refused to allow him so to do, and said he would not complete the contract. In an action for the deposit, held, it was no defence, that the contract was not completed on the day mentioned, the defendant not having given notice that he should insist upon this term of the contract.²

40. Agreement to sell a piece of land for a certain price, payable in instalments, the deed to be given on payment of the first instalment. Five months after the first day of payment, the vendee offered the money due, and asked to show the deed to his counsel, which the vendor refused, and, in a month afterwards, the vendee tendered the money due, with interest, and then brought an action of ejectment, in the nature of a bill for specific performance. Held, as time did not appear to be of the essence of the contract, and as both parties regarded the agreement in force five months after the time fixed, the lapse of another month, as there was no change in the value of the property, did not extinguish the vendee's right. If the vendor had considered the agreement at an end, he should have notified the vendee of the fact.³

¹ *Rippingall v. Lloyd*, 2 Nev. & Mann. 410.

² *Carpenter v. Blandford*, 8 Barn. & Cress. 575.

³ *Remington v. Irwin*, 14 Penn. 143.

41. The question of time has also frequently been raised, in connection with the delivery of *an abstract of title*. Thus it has been held, that merely undertaking to deliver an abstract and possession at a particular time does not make it of the essence of a contract.¹

42. Where objections to title are to be considered as waived, unless made within a certain time after delivery of the abstract, it has been doubted whether that condition can be insisted on, if the abstract is very defective.²

43. The defendant, a purchaser of a public-house, insisted that time was of the essence of the contract, and that the abstract had not been delivered within the time agreed on. A reference, without prejudice, was made, on motion, as to the title, and when it was first shown.³

44. An agreement for the purchase of an estate stipulated, that an abstract of title should be delivered immediately, and, if the contract was not completed by a given day, the purchaser be released. The abstract was not immediately delivered, but communications on the subject of the title were continued between the parties, until the time limited by the contract had expired. Held, the stipulation as to time was waived by the purchaser.⁴ So a purchaser cannot abandon a contract, on the ground of the vendor not having perfected the title within a reasonable time, where the former, who was in possession, had been aware from an early period of the treaty, that there was some objection to the abstract, but has nevertheless continued to negotiate down to a recent period, and then on a sudden (a fortnight after the last act of negotiation) notifies the vendor that he abandons the contract. In such case, an injunction will be granted, to stay an action at law for the purchase-money, on motion, almost as of course; and, if the case were made out, it would be sufficient on the hearing.⁵

45. The abstract, though delivered very late, and under a

¹ *Boehm v. Wood*, 1 Jac. & Walk. 419.

² *Cutts v. Thodey*, 13 Sim. 206.

³ *Foxlowe v. Amcoats*, 3 Beav. 496.

⁴ *Hipwell v. Knight*, 1 You. & Col. 419.

⁵ *Warder v. Jeffery*, 4 Price, 294.

notice that the vendee would insist on his deposit, with interest, if the title should not be made out and possession delivered, by the time of payment, was received and kept without objection; the vendee, upon the construction and circumstances, not being entitled to insist on the time, as of the essence of the contract; specific performance was decreed.¹

46. July 22d, an estate was put up at auction. By the conditions of sale, an abstract of title was to be furnished within seven days, upon demand; all objections considered as waived, unless made within eight days thereafter; and the purchase completed August 8th. July 24th, the solicitor of the purchaser called for the abstract. The land being mortgaged, and the mortgagee abroad, the abstract was delayed till August 3d. The purchaser thereupon claims to rescind the sale, and brings an action for the deposit; and the vendor files a bill for specific performance, to which the defendant demurs. Held, the time of delivery of the abstract was not of the essence of the contract, and the demurrer was overruled.²

47. Questions have sometimes arisen, as to the effect upon the contract of a *deterioration* in the value of the property, arising from lapse of time. Upon this subject it is held, that deterioration of the estate, arising from delay in completing the purchase, is not a ground for rescinding the contract, but may be the subject of an allowance to the purchaser.³

48. The amount of deterioration, pending a suit for specific performance, having been ascertained by an issue, the purchaser was allowed it out of his purchase-money, which he had paid into Court under an order; with interest from the time when he paid in his money.⁴

49. The completion of a contract being delayed for three

¹ Seton v. Slade, 7 Ves. 265.

³ Lord v. Stephens, 1 You. & Coll.

² Roberts v. Berry, 17 Eng. Law & Eq. 400.

222.

⁴ Ferguson v. Tadman, 1 Sim. 530.

years by difficulties in the title, the vendor was held accountable for a deterioration of the land during that period.¹

50. Questions often arise as to the *construction* of contracts in reference to the time of performance.

51. Under an agreement for conveyance of land, on payment of the purchase-money, a certain amount of which is to be paid annually, "the time commencing at the date of the agreement;" the day of the date is to be excluded; although the purchaser in the mean time is to have the use of the land.²

52. All objections to a title were to be taken, within twenty-one days from delivery of the abstract, or deemed waived; and time was, in that respect, to be considered of the essence of the contract. Held, the twenty-one days did not begin to run, until a perfect abstract had been delivered.³

53. Where parties contract, that the purchase of lands shall be completed within so many *months*, calendar months are intended.⁴ But the word *month* may mean lunar or calendar month, according to the intention of the contracting parties. Sale of land on the 24th of January; an abstract of the title to be delivered to the purchaser within a fortnight, to be returned by him in two months, to be redelivered within four months, and the purchase to be completed on the 24th of June, making a period of precisely five calendar months from the date of the sale and conditions. Held, calendar months were intended. And the condition for delivery of the draft of the conveyance within three months was not a condition precedent, with respect to its delivery within the precise time.⁵

54. A vendor, in Illinois, covenanted with the vendee, in Boston, to convey to him certain lands in Illinois, before a certain day. It was also verbally agreed, at the time, that the former should record the deed in Illinois, before sending

¹ Foster v. Deacon, 3 Madd. 394.

² Farwell v. Rogers, 4 Cush. 460.

³ Hobson v. Bell, 2 Beav. 17.

⁴ Hipwell v. Knight, 1 You. & Coll. 419.

⁵ Lang v. Gale, 1 Mau. & Selw. 111.

it to Boston, but that it should reach Boston before the day named. Held, the covenant was performed by depositing the deed in the registry before the day, though not sent to Boston till after.¹

55. Action on an agreement to let the plaintiff a messuage for a year from the 25th of March; he to take the fixtures at a valuation, and pay for them on entry. Held, the plaintiff might show a tender on the 10th of April.²

56. By the conditions of a sale, which took place September 18th, the purchaser was immediately to pay a deposit, in part of the purchase-money, and to sign an agreement for payment of the remainder by the 28th of November; the vendor was to deliver an abstract within fourteen days from the sale, and to deduce a good title; objections to the title were to be taken within twenty-one days after delivery of the abstract; and the purchaser was to prepare the deeds of conveyance by the 10th of November. Held, no precise time was fixed, within which the vendor was to deduce a good title, and therefore a declaration against him for failing to do so ought to aver, that he had been allowed a reasonable time.³

¹ *Shaw v. Hayward*, 7 Cush. 170.

² *Edman v. Allen*, 6 Bing. N. C. 19.

³ *Sansom v. Rhodes*, 6 Bing. N. C.

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CHAPTER XII.

TITLE OF THE VENDOR.

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| 1. General importance of the subject. | 21. Mutual rights and obligations of the parties, as to conveyance of the land and payment of the price. |
| 2. In general, the vendor is bound to convey a <i>good title</i> . | 28. Question of <i>time</i> , in reference to the title. |
| 15. Destruction of the property sold, after the sale. | 36. <i>Waiver</i> of title. |
| 18. Grounds of objection to the title. | |

1. THE *title* which a vendor of real property is bound by his contract to convey to the vendee, is of course one of the most important topics connected with the general subject of this work. Indeed, it may be said to connect itself, directly or indirectly, with almost every branch of that subject. A mere engagement to convey certain land is worth little or nothing to the proposed vendee, unless the vendor is the owner of that land. It is an important question, therefore, how far such *ownership* is an essential element or condition of the contract, and what binding assurance or guaranty of title the purchaser is entitled to receive. The same question arises in regard to *liens or incumbrances* upon the land, diminishing its value to the purchaser; and a want of title to *a part* only of the property. So, also, the time and mode of *settling questions of title*, and the right of *rescinding or claiming compensation* for defects of title, are matters upon which numerous questions and nice distinctions are to be found in the books.

2. It is held, as the general doctrine, that an agreement to sell land implies that the title shall be good and unin-

cumbered.¹ (a) So, if the contract be, "to convey the land by a deed of conveyance," for a stipulated price, this is not fulfilled by executing a deed merely; but the party must be able to convey such a *title*, as the other party had a right to expect; and this is to be determined from the fair import of the terms used, with reference to the subject-matter.² More especially, when a vendor seeks specific execution of the contract, he must, if required by the defendant, exhibit such a title as the contract requires.³ So, where A. agreed to do work for B., and take certain land in payment, to which B. agreed to make title to him; the title not being in B., A. may rescind the contract, or, if he does the work, he will be entitled to payment in cash.⁴ So, in case of a contract to buy and sell certain lands; the seller, on compliance with the terms, to give a sufficient deed; held, he was bound to convey an unincumbered legal estate in fee.⁵ So, an agreement to convey land, generally, and with nothing in the transaction itself to indicate the kind of conveyance, requires a deed in fee simple, with covenants of general warranty.⁶ So a covenant to give a good and sufficient deed of conveyance, free of all incumbrances, binds the party to give a deed which passes a title to the land.⁷ So a contract to give *a good and sufficient deed* requires a legal title in the grantor; not merely a deed containing covenants of warranty and against incumbrances.⁸ If the vendor cannot make such a title, the purchaser may recover back the purchase-money with interest.⁹

3. Bill for specific performance of a contract to convey

¹ Prothro v. Smith, 6 Rich. Eq. 324; ⁶ Witter v. Biscoe, 8 Eng. (Ark.) Wilde v. Foot, 4 Taunt. 334; Watts v. 422.
Waddle, 1 M'L. 200.

² Lawrence v. Dole, 11 Verm. 549.

³ Tomlin v. M'Chord, 5 J. J. Marsh.

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⁴ Fitch v. Casey, 2 Greene, 300.

⁵ Owings v. Baldwin, 8 Gill, 337.

⁷ Hill v. Resseguen, 17 Barb. 162.

⁸ Fletcher v. Button, 4 Comst. 396.

See Garley v. Rice, 16 Johns. 267;
Parker v. Parmelee, 20 Johns. 130.

⁹ Ibid.

(a) An agreement by a party to pay a certain sum, "if he should get certain land," means, "if he should acquire a valid title to the land." Woods v. Kirk, 8 Fost. 324.

land. The defendant agreed to "convey by a good and valid deed," within one year, upon four days' notice, on condition of the plaintiff's paying in a specified manner at the expiration of the year or the notice. A previous deed of the land, unrecorded and unknown to the plaintiff, assigned to the defendant's grantor a mortgage made by a former owner, containing a reservation of "such interest as the mortgagor acquired by virtue of a certain prior mortgage of the same to him to secure the payment of \$1,400." The plaintiff afterwards made inquiry of the defendant respecting the reservation, and notified him that he should not accept a quitclaim deed. The defendant made no explanation, but offered, for a further sum, to clear up the title. Within the year, the plaintiff notified the defendant, that he should take the property, as agreed, and demanded a warranty deed, tendering the price. The defendant refused to give such deed, but tendered a quitclaim deed, and demanded payment, which the plaintiff refused. Held, the conveyance and payment were to be concurrent, and each party was bound to perform, on his part, at the time appointed; that the plaintiff was not bound to accept a quitclaim deed, or make further advances, till the title was cleared up; that any deed, passing a clear title in fee, would satisfy the contract, but, as the property was apparently incumbered, the defendant was bound either to remove or explain the incumbrance, or give a warranty deed.¹

4. It is further said, on this subject, that where one contracts to purchase, on the faith of the vendor's having a good title, he has a right to have the title *sifted to the bottom*, before he can be called upon either to accept an indemnity or compensation for a defect, or to abandon the contract.² So, equity will not compel a purchaser to take a *doubtful title*; as where it depends on the doubtful interpretation of a will, all parties in interest not being bound by the decree.³

¹ 22 Conn. 513.

² Knatchbull v. Grueber, 3 Mer. 137.

³ Sohler v. Williams, 1 Curt. 479.

5. A title is doubtful, when it is such as other persons may fairly question, although the Court entertains a favorable opinion of it.¹ If the doubts concerning a title arise upon a question connected with the general law, the Court is to judge whether that law is settled; if not, or if extrinsic circumstances, which neither the purchaser nor the Court can satisfactorily investigate, may affect the doubt as to the title; specific performance will be refused.² Thus, upon a bill by a vendor for specific performance, the case turned on the construction of a will, and the Court strongly inclined in favor of the title; but, the opinion not resting upon any general rule of law, or upon reasoning which would necessarily satisfy others, or preclude substantial litigation; specific performance was refused.³

6. Written agreement, executed at the time of the delivery of a deed of land, and the making of a note for the price, that if, in a suit then pending between other parties, involving part of a certain line, another part of which affected the boundaries of the land conveyed, it should be decided that the grantor was not entitled to a certain part of the land, he should repay part of the price. Held, the effect of the agreement was, to make his right and title to convey dependent upon the final decision of the suit; and an adverse judgment therein might be set up in defence *pro tanto* to an action for the price.⁴

7. The right to a good title does not grow out of the agreement between the parties, but is given by law. But a purchaser may waive his right, by going on with the agreement after he has full notice that he is not to expect a good title. This is, in such case, matter of notice, and not of contract.⁵ Where the doubt as to a title is upon matters of fact, it may form a proper case for an issue at law; and, till the doubt is removed, or confirmed, by further investigation, the Court will not either decree performance or dismiss the bill.⁶

¹ *Pyrke v. Waddingham*, 17 Eng. Law & Eq. 534.

² *Ibid.*

³ *Ibid.*

⁴ *Daggett v. Daggett*, 8 Cush. 520.

⁵ *Ogilvie v. Foljambe*, 3 Mer. 53.

⁶ *Seymour v. Delancey*, 1 Hopk. 436.

8. But, on the other hand, it is held, that, in order to maintain a bill for specific performance, a vendor need only prove *a good marketable title*; not one which may not possibly be defeated.¹ Thus, in case of an agreement to convey land, the title to be “good and satisfactory to the party to receive it;” the purchaser is bound to accept a title free from any reasonable objection.² So a good title may be made, although the origin cannot be shown by any deed or will; by proof of such a long, uninterrupted possession, enjoyment, and dealing with the property, as afford a reasonable presumption that there is an absolute title in fee simple.³

9. More especially, if the obligor in a bond for titles is insolvent, or without the jurisdiction of the Courts, leaving no property within it liable for the claim against him, and there is an outstanding paramount title; the vendee shall have relief from payment of a proportional part of the price, before eviction. The particular circumstances relied on for such abatement must be distinctly alleged.⁴ But, in an action by the assignee of a purchaser against the vendor, to enforce specific performance, it is no defence, that the assignor, with another person, owes the defendant the purchase money of other land, that they are insolvent, and the land an inadequate security.⁵

10. Where the contract binds the vendor to give a good title, the want of such title may avoid the contract at his election, even though the purchaser seeks to enforce it. Thus, one of the terms of an agreement was, that the contract should be void, if the purchaser’s counsel should be of opinion that a marketable title could not be made by a certain time. The counsel being of that opinion, a bill by the purchaser for specific performance, with compensation, was dismissed with costs; and an application, afterwards made by the plaintiff, that his deposit might be set off

¹ Thompson v. Dulles, 5 Rich. Eq. 370.

⁴ McGehee v. Jones, 10 Geo. 127.

² Fagen v. Davison, 2 Duer, 153.

⁵ Seaman v. Van Rensselaer, 10 Barb. 81.

³ Cottrell v. Watkins, 1 Beav. 361.

against the defendant's costs, and the surplus (if any) paid to him, was refused with costs.¹

11. Contrary to the prevailing doctrine upon this subject, which is as above stated; it has been questioned, whether a covenant to give a good and lawful deed relates to *the form of the deed*, or to *the goodness of the title*.² So it has been held, that a bond, to make title free from incumbrances, is fulfilled, by a conveyance in fee simple free from incumbrances, accepted by the vendee.³ So, in case of an agreement to give a deed of three out of sixteen tenements to the builder, when completed; held, the deed must be a conveyance in fee simple, of the three tenements designated by the parties, with a covenant against incumbrances done or suffered by the grantor.⁴ So an agreement, on a sale of land, "to execute a deed" to the purchaser, has been held satisfied by executing a deed without warranty or covenants.⁵

12. Action by the vendor, upon a contract for the sale and exchange of lands, the title to be "satisfactory to the party to receive it." Answer, that the lands were subject to the lien of certain judgments, which the plaintiff was to convey on the day appointed for the exchange of deeds. Held, the defendant could not show, that the judgments were an apparent, though not a real lien, and therefore a cloud upon the title.⁶

13. An agreement, made in 1849, recited, that the father of the plaintiff, in 1797, demised certain premises to one A., and that the plaintiff, under a devise from his father, owned the reversion in fee. The agreement then provided, that the plaintiff would, on receiving from the defendant \$2,000, in certain annual instalments, with interest, the last payable in 1859, convey the property with warranty, excepting any title or right under the lease. The defendant agreed to pay the \$2,000; and it was agreed that he should enter immedi-

¹ Williams v. Edwards, 2 Sim. 78.

² Winne v. Reynolds, 6 Paige, 407.

³ Johnson v. Collins, 17 Ala. 318.

⁴ Ellis v. Burden, 1 Ala. (N. S.) 458.

⁵ Van Eps v. Corporation of Schenectady, 12 Johns. 436.

⁶ Fagen v. Davison, 2 Duer, 153.

ately and pay the taxes. The plaintiff brings this action for an instalment of the principal and the interest. The answer alleged, that the farm or a large part of it was in possession of persons holding or claiming adversely, but stated no facts constituting such adverse possession. Held, as the agreement recited that the plaintiff was a reversioner, the plaintiff was not bound to have given possession; that he did not agree to give possession, but the defendant was to take it, and be himself the actor; and that the answer was no defence, as there can be no adverse possession against a reversioner.¹

14. By an unsealed instrument, A., in consideration of £7,000, agreed to present to a rectory, on the next avoidance, such person as B. should nominate, and to furnish an abstract and execute a conveyance of the next presentation to B. A. afterwards, with the assent of B, agreed to sell the next presentation to C., and to convey such title as he (A.) had received, in consideration of £7,500, of which £500 was to be paid to B. on a certain day. A. furnished an abstract of such title as he had, but C. refused to take it, and no conveyance was tendered to him. In an action by B. against C. for the £500: held, that there was a sufficient consideration for C.'s promise; that A. was not bound to make a marketable title, but only to convey such as he had received; and that, as C. refused to accept that title, it was not necessary to tender a conveyance.²

15. The title to be acquired by a purchaser may be affected, by circumstances occurring after the making of the contract; as by the partial destruction of the property sold.

16. Contract for the sale of houses; which, from defects in the title, could not be completed on the day. The treaty, however, proceeded, upon a proposal to waive the objections on certain terms. The houses being burnt before a con-

¹ *Clarke v. Hughes*, 13 Barb. 147.

² *Wilmot v. Wilkinson*, 6 Barn. & Cress. 506.

veyance; the purchaser is bound, if he accepted the title, although the vendor suffered the insurance to expire, at the day when the contract was originally to have been completed, without notice. A reference to the master was therefore directed, to inquire whether the proposal was accepted, or acquiesced in, on behalf of the purchaser.¹

17. A. articles, on behalf of B., to purchase four houses in Jamaica, for £800. The houses are soon afterwards swallowed up by an earthquake. Although A. had no assets of B., yet he was decreed to pay the purchase-money.²

18. With regard to the particular grounds of exception to the title of a vendor, it is foreign from the plan of the present work, to consider the various modes of acquiring title; as by deed, inheritance, or devise; our inquiries being strictly limited to executory contracts of sale, and not embracing those executed alienations, by which such contracts are often perfected. Ordinarily, the title of the vendor is exhibited by documentary evidence; as by a deed or will. Sometimes, however, questions have arisen upon the sufficiency of other proof. Thus, upon a bill for specific performance of a sale, and exceptions to the master's report in favor of the title; one link in the chain, was a deed found among the title papers, accompanying the possession, but with respect to which the weight of evidence was, that the deed was not genuine. By excluding that deed, the complainant would be reduced to rely upon *adverse possession*, which was less than twenty-five years. There was slight evidence that the maker of the deed was an alien, and, if not so, there was no account of his heirs or devisees. Held, a case proper for an issue at law. If the complainant's title had been clearly adverse for twenty-five years, it would not be sufficiently impeached by the possibility, either of an escheat, or of such grantor's having left heirs or devisees, whose title would be protected by disabilities. Such title by adverse possession would be sufficient to preclude all other questions, and to be

¹ Paine v. Meller, 6. Ves. 349.

² Cass v. Rudele, 2 Vern. 280.

made the ground for a decree.¹ In the same connection it may be stated, that the *alienage* of the vendee is an insufficient ground, to entitle the vendor to a decree rescinding a sale, though it may afford a reason for refusing specific performance against the vendee. But, if the parties have not an adequate remedy at law, the vendor may be considered as a trustee for purchasers under a sale by order of the Court, for the benefit of the vendee.² But a vendee will not be compelled to take a title, founded on a decree against *an infant*, because the latter may show cause against it when of age.³ So, where title is sought through a wife, the husband must be made a party, in order to decree a good title. And so where there is a dower interest outstanding.⁴

19. The decree of title in one State, to lands in another, cannot vest the legal title.⁵

20. A contract to convey, so soon as a suit then pending for the title shall be decided, gives to the vendor all the time necessary to close the litigation in all its forms.⁶

21. We have already considered (Chap. 3) the liability of a purchaser to pay the stipulated price, as depending upon the vendor's performance of his part of the agreement. It may be added in the present connection, that, in a contract for the sale of land, if the price is to be paid at the time of the conveyance, the covenants to convey and to pay the price are dependent covenants, and the declaration in an action for the price must aver a readiness to convey, and the plaintiff must prove his ability to convey.⁷ So an injunction, to a judgment for the purchase-money, ought not to be dissolved, until a good and sufficient deed be tendered by the vendor.⁸

22. Bond from defendant to plaintiff, to convey land by a quitclaim deed, at a day named, on payment of a certain sum. On the day, the plaintiff, having the money within reach, though not actually in hand, offered to pay it, but

¹ Seymour v. Delancey, 1 Hopk. 436.

² Hepburn v. Dunlap, 1 Wheat. 179.

³ Bryan v. Reed, 1 Dev. & Batt. Eq.

86.

⁴ Watts v. Waddle, 1 McL. 200.

⁵ Ibid.

⁶ Ibid.

⁷ Lawrence v. Dole, 11 Verm. 549.

⁸ Grantland v. Wight, 2 Munf. 179.

made no formal tender; but the defendant required payment before the conveyance was made. Held, the plaintiff was entitled in equity to a decree for a quitclaim-deed of the land, free from incumbrances since the date of the bond.¹

23. Land was sold at auction to the defendant, who subscribed the terms of sale; which were, that a certain part of the purchase-money should be paid within seventy-five hours; a deed given by the vendor, with warranty of title, except as to the quit rents, in such lots as should be designated; that the purchaser should execute a bond and mortgage for the residue of the purchase-money; and that the deed, bond, and mortgage, should bear date on the day of the sale. At the time of sale, the premises were subject to a registered and unsatisfied mortgage. The vendor brings *assumpsit*, for breach of the conditions. Held, that giving the deed, bond, and mortgage, were to be simultaneous acts; that, as the plaintiff was not in a situation to convey an indefeasible title, the defendant was not bound to perform the agreement on his part; and that defendant's notice of the registration was immaterial, because, according to the true construction of the terms of sale, the quit rents were the only incumbrance.²

24. In the sale of a farm, it was stipulated, that part of the purchase-money should be paid when the deed was ready, and the residue in annual instalments. Held, the vendor could not claim any part of the purchase-money, until he had tendered an unincumbered title; not merely a warranty deed; the farm being subject to a mortgage then due.³ (a)

¹ Parker v. Perkins, 8 Cush. 318.

³ Swan v. Drury, 22 Pick. 485.

² Judson v. Wass, 11 Johus. 525.

(a) In an action by the vendor upon such contract, parol evidence is inadmissible that, when the contract was made, the vendee knew of the mortgage, and that it was then agreed, that the mortgage should remain. The vendor having tendered a warranty deed, held, the declarations of the vendee, made previously to the tender, that he should not insist on the removal of the incumbrance, were not a waiver of exception to the title, unless, taken

25. Contract for the sale of lands, made in August, 1845. The vendee agreed to pay therefor \$950, viz.: \$200 in April, 1846, \$200 in April, 1847, and the rest in two subsequent annual payments. The vendor agreed to deliver possession in November, 1845, and a deed in May, 1846. Possession was delivered and the first instalment paid, but no deed delivered or tendered. Held, an action did not lie for the second instalment.¹

26. Although the vendee has paid the price, and the vendor offers to perform the contract on his part; still no title passes till the deed is actually accepted. Bond for a conveyance. The obligee occupied under the bond for nineteen years, and paid the purchase-money, and the obligor made, executed, and tendered a deed, but the obligee refused to accept it or surrender the bond. Held, he acquired no title to the land.²

27. The *mutuality* of the contract imposes an obligation of the same nature upon the vendee as upon the vendor. Thus the vendor is not bound to tender a deed and demand payment, except for the purpose of enabling him to affirm the contract, and recover the purchase-money in a suit at law. And, where payment at a particular day is made an essential part of the contract, if the vendee wishes to have specific performance, he must tender or offer the money at the time, upon the receipt of a deed.³ So, on a sale under a decree, the abstract stated, that the vendor was devisee of A., who took as heir to B. On inquiry, the vendor's solicitor confirmed that statement; and the master accordingly approved of the title. Just before the conveyance, the purchaser discovered that C.

¹ Grant v. Johnson, 1 Seld. 247.

² Dwinal v. Holmes, 33 Maine, 172.

³ Wells v. Smith, 7 Paige, 22; S. C.

2 Edwards, 78.

in connection with what took place at the time of tender, the whole evidence proved, that the vendee intended at that time to waive such exception; for such declarations, being made without consideration, were not obligatory, it not appearing that the vendor acted on the faith of them, or had been subjected to any damage or expense thereby.

was the heir of B.; and it appeared that the solicitor had received information of that fact, but concealed it. A motion, by the purchaser, to be discharged from his purchase, was granted, though the vendor had obtained a release from C. before the motion was made.¹ So under a decree directing the sale of an estate, which as against T., one of the defendants, was only a decree *nisi*, and before the decree was made absolute, the estate was sold, and A. was reported the purchaser. Afterwards, on the application of A., an order was made by the Vice-Chancellor for discharging him from the purchase, on the ground that the decree was not absolute as against T. The vendor immediately gave notice of a motion before the Lord Chancellor, to discharge that order, and, that motion having stood over a considerable time, the decree was made absolute as against T., before it was heard. Held, the purchaser was entitled to be discharged at the time the application was made, and, having been once discharged by an order which was right at the time, the contract could not be revived by the subsequent proceedings.²

28. We have already considered (Chap. 11) the question of *time*, as bearing upon the respective rights and liabilities of vendor and vendee. As has been stated, time is generally treated as of the essence of the contract. Thus, if the vendor of an estate by auction does not show a clear title by the day specified, the purchaser may immediately recover back his deposit, and rescind the contract.³ So, where it was an objection to a title, that it was doubtful whether the wife of a party to a deed thirty years old was barred by that deed of her dower; it was not answered by proving at the trial that she was then dead, such proof not having been before given.⁴ So, it being necessary, in order to make a title perfect, that a recovery should be suffered, for the purpose of barring an old estate tail, vested in one not a trustee for the

¹ Dalby v. Pullen, 3 Sim. 29; 1 Russ. & Myl. 296.

² Coster v. Turnor, 1 Russ. & Myl. 311.

³ Wilde v. Forte, 4 Taunt. 334.

⁴ Ibid.

vendor; the deed making the tenant to the præcipe, and the warrant for suffering the recovery, were executed before the filing of the bill for specific performance, but the recovery was not completed till a few days afterwards. Held, a good title was not shown before commencement of suit.¹ So A., being entitled, under his marriage settlement, to a life interest in certain freehold estates, remainder to the use of trustees for a term of one thousand years, to secure a jointure and portions, remainder to himself in fee, conveyed part of the lands to B. in fee, in exchange for other lands. B.'s heir having afterwards contracted for the sale of the land, the purchaser refused to complete the contract, on the ground that A. had no power to exchange the lands in fee. The vendor then procured the execution of certain deeds, with a view of bringing the exchange within the terms of a power of sale and exchange, given to the trustees under the settlement. Held, under these circumstances, and likewise on the ground that the after-executed deeds were grossly inaccurate, the purchaser was not bound specifically to perform the agreement.²

29. But, on the other hand, it has been held, that the purchaser cannot avoid the sale upon the ground of want of title at the time, provided the vendor reasonably satisfies his contract in this respect. Thus, where one agrees to sell an estate, a small portion of which turns out to be the property of another person; the Court will not discharge the purchaser from his contract, without giving the vendor an opportunity of acquiring a title to that portion.³ So where, by the terms of a sale, the vendee was entitled to immediate possession, the first payment to be made in part, by his obtaining an assignment of a judgment against the vendor, after which the deed was to be given, the judgment cancelled, and the residue of the first instalment paid; held, the vendor was entitled to a reasonable time, after notice of objections to his title,

¹ *Lewin v. Guest*, 1 Russ. 325.

³ *Chamberlain v. Lee*, 10 Sim. 445.

² *Cowgill v. Lord Oxmantown*, 3 You. & Coll. 377.

to clear off the incumbrances, and procure the necessary certificate that the property was unincumbered. Also, that three weeks was not an unreasonable time.¹ So, though equity will not compel a purchaser to take a title substantially defective, yet it is the privilege of the vendor to complete his title, at any time before a decree, provided there has been no unnecessary delay; and, if the purchaser fore-stalls him, and perfects the title himself, he is not entitled to rescind, but can claim only the expenses of removing the defect.² So, A. purchased land from B. and gave his bond for the purchase-money. Afterwards, supposing the title to be defective, A. procured a conveyance from C., the original owner, under whom B. claimed, B. having refused to procure such conveyance himself. Held, although A. might have claimed to have the contract rescinded before his purchase from C., he could now only claim to be reimbursed what it had cost him to perfect the title.³

30. Greater vigilance is required of the vendor, in perfecting the title to the purchaser, where the latter is not in possession under the contract. But where a day is fixed for the conveyance, the vendee must give notice of any objections to the title a reasonable time previous to the day, that the vendor may remove them and convey at the time; or equity may consider a strict performance by a conveyance on the day as waived. And, where the vendor has not been guilty of gross negligence in perfecting his title, equity may decree a specific performance, upon a bill filed by him, although the title was not perfected on the specified day; unless the time is expressly made an essential part of the agreement.⁴

31. So, as has been seen, (Chap. 11,) it has been often held in equity to be a sufficient compliance with the contract, if a party can make a good title in a bill for specific performance, at any time before the final decree.⁵ So, where the

¹ *More v. Sniedburgh*, 8 Paige, 600.

² *Westall v. Austin*, 5 Ired. Eq. 1.

³ *Kindley v. Gray*, 6 Ired. Eq. 445.

⁴ *More v. Sniedburgh*, 8 Paige, 600.

⁵ *Bennett, &c. v. Carey*, 3 Bro. 390.



vendor declines executing the contract, upon the ground that he is unable to give a good title, and the purchaser files his bill, to compel the defendant to complete the contract, or rescind it; if the defendant is able to give a good title at the time of the decree, the complainant will be compelled to accept it. But the defendant will be decreed to pay interest upon the purchase-money, from the time a conveyance was demanded.¹ So, the plaintiff, in a bill for specific performance, more especially where time is not material, and there has been no unreasonable delay, is entitled to a decree, if, at the hearing, he can show a good title, although he had not such title at the time of the contract, or the commencement of suit. Otherwise, if the defendant retired from the contract as soon as the want of title was discovered.² So, though a vendor cannot come at any distance of time for a performance; yet, where a bill was filed fourteen months after the correspondence upon the objections to the title ceased, by the defendant's returning no answer to the last letter, by calling for a distinct answer, and threatening a bill, and the auctioneer had not been called on to return the deposit, it was referred to the master.³ So, though a covenant to execute and deliver *a good and sufficient deed* means *an operative conveyance*, or one that transfers a good and sufficient title, not a title admitted to be doubtful; yet a title at the time of the decree, or the coming in of the master's report, is sufficient; and the party may be allowed then to perform his contract, and save the forfeiture of his bond, on making compensation for the delay. The rule of compensation is the amount of the interest on the bond, from its date to the time of final decree.⁴

32. Bill for specific performance. The plaintiff, claiming through an alien, contracted to sell the estate, having for this reason no legal or equitable title to it. The purchaser, by his own inquiries, ascertained the defect, but did not, till after some months of negotiation with the plaintiff, repudiate the contract. Pending the investigation of the title in the mas-

¹ *Pierce v. Nichols*, 1 Paige, 244.

² *Hoggart v. Scott*, 1 Russ. & Myl. 293; *Wynn v. Morgan*, 7 Ves. 202.

³ *Hertford v. Boore*, 5 Ves. 719.

⁴ *Clute v. Robison*, 2 Johns. 595.

ter's office, the plaintiff obtained a grant of the estate from the Crown. Held, he was entitled to a decree.¹

33. But though equity will decree specific performance of a sale of land, if the vendor is able to make a good title at any time before decree; the dismissal of the bill is a bar to a new bill for the same object. But the inability of the vendor to make a good title at the time of decree, though ground for refusing a specific performance, will not authorize a Court of Equity to rescind the agreement, where the parties have an adequate remedy at law for its breach.²

34. Where a purchaser, having discovered a technical defect in the title, abandons it, and files a bill to enjoin collection of the price; and the vendor then supplies such defect; the vendee is bound to complete the purchase.³

35. When performance of a contract of purchase is resisted, upon grounds wholly independent of the title, and the objections are overruled; or when the purchaser, although doubtful of the title, consents by his answer to accept it, if in the judgment of the Court it can be rendered valid; it is sufficient to warrant a decree for specific performance, that a good title can be made within a reasonable time before the final decree. But when the purchaser rejected the title offered, as insufficient, and upon that ground refused and still refuses to complete the contract, the entire controversy turns upon the validity of the objections, and, if they are sufficient, the Court will not decree specific performance.⁴

36. Although a vendee may require a good and satisfactory title to the estate sold; yet by his own conduct he may *wave* his rights in this respect. Thus, a purchaser buying with full knowledge of a defect in the title will not, for that defect, be permitted to come into equity for relief.⁵ So, the Court will not set aside the purchase of a house and lot, on the allegation of an imperfect or incumbered title, not clearly shown to be so, after long possession by the purchaser, and

¹ *Eyston v. Simonds*, 1 You. & Col. C. C. 608.

² *Hepburn v. Dunlap*, 1 Wheat. 179.

³ *Mays v. Swope*, 8 Gratt. 46.

⁴ *Dominick v. Michael*, 4 Sandf. 374.

⁵ *Craddock v. Shirley*, 3 Marsh. 1139.

a confession of judgment for the purchase-money. Such conduct amounts to a waiver of objections, though the Court might give some relief, ultimately, if the title turned out to be bad. The vendor having enforced the judgment, and bought in the property at a very low rate, but offering to rescind the sale on payment of the debt, the Court decreed accordingly.¹ So, although a complainant who seeks specific performance of a sale, but has not performed his part of the contract, is not entitled to a decree, especially if any injury has resulted to the defendant; if the defendant has taken possession, paid part of the purchase-money, and executed the agreement in part; the Court will consider him as having waived his objections, and will decree the execution of the agreement. It will, however, extend the time of payment, vary the security to be given, and regulate the payment of interest, according to the justice of the case.² So a purchaser, in possession under an agreement, having exercised acts of ownership, but objecting to the title, was ordered to pay in the purchase-money; and slighter acts of ownership were held sufficient, if subsequent to a discovery of an objection to the title.³ So, where the vendee has entered into possession, if he wishes to rescind the contract, on the ground that the vendor has not perfected his title, and executed a conveyance within a reasonable time, or at the time specified, he must give up the possession.⁴ So if a purchaser, after delivery of the abstract, on the face of which, part of the estate appears to be subject to a right of sporting, not mentioned in the particulars of sale, enters into possession, he waives that objection; notwithstanding a subsequent offer of compensation, made by a clerk of the vendor's solicitor, without express authority.⁵

37. Conditions of sale stipulated, that the sale should be completed on a certain day; that objections to the title, not

¹ *Roach v. Rutherford*, 4 Desaus. 126; *Fludyer v. Cocker*, 12 Ves. 27.

² *Ramsay v. Brailsford*, 2 Desaus. 582.

³ *Dixon v. Astley*, 1 Mer. 133.

⁴ *More v. Sniedburgh*, 8 Paige, 600.

⁵ *Burnell v. Brown*, 1 Jac. & Walk. 168.

made within twenty-one days from delivery of the abstract, should be considered as waived; and that, if the purchaser should not comply with the conditions, his deposit should be forfeited, and the vendor at liberty to resell. The purchaser did not deliver his objections, until several weeks after the twenty-one days, and after the day appointed for completing the purchase; the vendor's solicitor, however, received them, and entered into a long correspondence with the purchaser respecting them, but without coming to a satisfactory conclusion. Finally, the vendor resold the property, at a less price, notwithstanding the purchaser's protest, and gave notice of his intention to file a bill to enforce the contract. About six months afterwards he filed his bill against the vendor, the auctioneer, and the second purchaser, to whom he had some months before given notice of his prior contract. Held, the conditions had been waived by the vendor's solicitor, and the Court decreed a specific performance by the vendor, with a reference to the master as to title; dismissed the bill, with costs, as against the auctioneer, who denied that he had ever intended to part with the deposit, and without costs as against the second purchaser, who claimed the benefit of his contract, if the Court should think that the plaintiff's ought not to be performed.¹

38. The defendant, a purchaser, was eight years in possession of premises, to which the vendor was unable to make a good title; and refused either to abandon the agreement, or accept such title as the vendor could give, but paid no purchase money or rent. Upon a bill filed by the vendor for relief, the Court directed the agreement to be delivered up to be cancelled, and the rents and profits accounted for, and ordered the purchaser to pay the costs.²

39. Written agreement to buy a farm at \$60 per acre; stating that it contained ninety-six acres, more or less. The subsequent deed used the same terms, and security was given for the price at \$60 for ninety-six acres. There were

¹ *Cutts v. Thodey*, 13 Sim. 206.

² *King v. King*, 1 Myl. & K. 442.

in fact but eighty-six acres. Held, the whole price might be recovered.¹

40. Agreement to sell the two leases and good-will in trade of a public-house and shop adjoining, for the sum of £4,250, "as he holds the same," for terms of twenty-eight years from midsummer next ensuing, at the annual rent therein mentioned. The purchaser agreed to accept a proper assignment of the said leases and premises as above described, without requiring the lessor's title; and, upon payment of said sum, the vendor agreed to execute an effectual assignment of the leases and deliver possession of all the said premises. Held, the vendee was bound to purchase the two leases, without inquiring into the title of the lessor, and could not refuse to complete his purchase, on account of an objection to that title.²

41. A condition of sale was, that, in case the purchaser should raise objections to the title, which the vendor should not be able or willing to remove, the vendor might rescind the contract, on notice, and repayment of the deposit; objections, not delivered within fourteen days after delivery of the abstract, to be treated as waived, in which respect time was to be essential. The purchaser returned the abstract, with queries, within the fourteen days, and the vendor answered the queries; the purchaser on the same day objected to the answers; the correspondence on the subject continued for several weeks, and then the vendor gave notice that he rescinded the contract. Held, the continuance of the treaty for completion of the title, after the first objection of the purchaser, was a waiver of the condition as to the rescinding; that such a condition of sale ought to be discouraged, and not to receive a construction oppressive on the purchaser; that the vendor's right to rescind must be coextensive with the purchaser's right to object to the title, under the same condition; that the vendor was only bound *bonâ fide* to

¹ Faure v. Martin, 3 Seld. 210.

² Spratt v. Jeffery, 10 Barn. & Cress. 249.

deliver an abstract of such title as he had at the time of delivering it; and, so long as the condition remained in force, was not bound to deliver any supplemental abstract of title afterwards acquired. It was doubted, whether the benefit of the condition would not in equity be forfeited, by a vendor who designedly delivered an imperfect abstract of the title which he had at the time of delivering it.¹ So, where land had been purchased under a decree in a creditor's suit, the Court, on the application of a creditor, who had for four years acquiesced in the purchase, and who was not supported in his objections by the other creditors, refused to set aside the purchase, on the ground of misdescription of the land in the particulars of sale.² So specific performance will be decreed against a purchaser, without reference as to the title, upon possession, and no objection made to *the abstract*.³ So, upon possession, a correspondence, and no objection to the title till two years after delivery of the abstract.⁴ So a purchaser, after long possession and vexatious objections to complete the purchase, was held to have waived his right to an investigation of the title, and decreed to perform the agreement specifically, and to pay interest at £4 per cent. on the unpaid purchase-money from the time of taking possession, and the costs.⁵

42. The rule above stated, however, will not be adopted in all cases. Thus, a purchaser was held entitled to an investigation of the title, notwithstanding possession taken, acts of ownership incident to possession, and preparation of a conveyance.⁶ So, where a devisee of real estate, subject to debts and legacies, had contracted to sell the estate, in order to raise money to pay the debts; and afterwards a bill was filed against her by the legatees, for the administration of the testator's estates; and the purchaser consented to go before the master, upon a reference as to the title in that

¹ Morley v. Cook, 2 Hare, 106.

² Price v. North, 2 Y. & Coll. 620.

³ Fleetwood v. Green, 15 Ves. 594.

⁴ Margravine, &c. v. Noel, 1 Madd. 310.

⁵ Hall v. Laver, 3 You. & Coll. 191.

⁶ Burroughs v. Oakly, 3 Swanst. 159.

suit; held, he was not thereby bound to take an equitable title, but might insist on having the same title, as he might have required, in a suit for specific performance; and that, as two commissions of bankrupt had issued against the devisee before the contract, though neither of them was proceeded in, he was not bound to accept the title.¹ So, where the conditions of sale provided, that all objections to the title disclosed by the abstract, not taken within a certain time after its delivery, should be deemed to be waived; held, the time for objecting was not to be computed from the delivery of an imperfect abstract; and an objection might still be taken, which arose out of evidence called for before the expiration of the time fixed.² So, in case of sale under a decree, the abstract stated, that the person, at whose death the sale was to be made, proved the will of the testator; but it did not state the pleading in the cause, or whether that person was living or dead. Held, this was not a sufficiently distinct intimation to the purchaser, that the time of sale had, without any sufficient ground, been anticipated.³ So, a contract of sale described the property purchased as "The cottage and paddock comprising 1 a. 2 r. 8 p. situate at, &c., described in the particulars as lot 1." The description of lot 1 in the particulars was, "The property comprises 1 a. 2 r. 8 p. situate, &c., consisting of a cottage and paddock in the occupation of Mr. P." By the contract of sale, the title and conveyance were to be completed according to the conditions of sale. One of these was, "The property comprised in the particulars is presumed to be correctly described, and the quantity of the land shall be taken as stated, whether more or less (although the title-deeds state such quantity to be less) without any compensation on either side. And no other evidence of identity shall be required than that furnished by the title-deeds, and the statements therein shall be deemed conclusive evidence of the identity of the property." On default, the

¹ *Cann v. Cann*, 1 Sim. & Stu. 284.

² *Hobson v. Bell*, 2 Beav. 17.

³ *Blacklow v. Laws*, 2 Hare, 40.

deposit-money was to be forfeited. The vendor delivered an abstract of title to 3 r. 22 p. only. Held, this did not, under the circumstances, authorize the purchaser to contend, that the title had not been made according to the conditions, and that he was bound to complete.¹ So, A. bought land of B., and gave his bond for the purchase-money, conditioned to be paid on B.'s making a clear title in fee-simple. B.'s agent delivered to A. a deed, on its face in fee-simple, but there were incumbrances on the land unknown to A. Held, A. might waive his right to a deed in fee, and accept a title for a less interest; that whether there was such a waiver, was a question for the Court; that there must be unequivocal proof of it; and the record of the judgment lien was not notice to A.²

43. W. T., being possessed of certain copyhold premises, mortgaged the same to P., and, by the indenture of mortgage, covenanted to surrender them into the hands of the dean and chapter of W., the lords of the manor, to the use of the defendant, who was to be a trustee to sell upon non-payment of the mortgage-money. W. T. made no surrender, but died, after devising all his real property to certain trustees. Subsequently, the lords of the manor, at the nomination of the defendant, granted the property to certain persons upon the above trusts, &c. W. T., in his life, surrendered other property to the lords of the manor, by way of mortgage to C., in consideration of a loan of £100, and, by an indenture of even date, covenanted, amongst other things, to repay the money borrowed, and gave the mortgagee a power of sale, upon non-payment. The defendant sold the whole property to the plaintiff, under the following conditions: that he should deduce a good title to the premises for the lives by which they were held under the dean and chapter of W., but that no earlier or other title should be deduced, or any deed or document produced, anterior to the last copy of the Court-roll, by which the premises were

¹ Nicholl v. Chambers, 8 Eng. Law & Eq. 423. ² Minor v. Edwards, 12 Mis. 137.

granted. Held, the defendant showed no title in himself, as no surrender of the premises had been made to his use by W. T., and the vendee was not precluded by the conditions from making this objection to the title, as it appeared on the face of the abstract delivered.¹

44. The objection to a title is not waived by the premature conditional approbation of the purchaser's counsel; but the expense of making out the title before this objection was taken shall be repaid.²

45. The purchaser's solicitor wrote to the vendor's solicitors, that, unless certain proof of title were adduced, the purchase must go off. Held, the purchaser might still maintain an action for his expenses in investigating the title.³

¹ *Sellick v. Trevor*, 11 Mees. & Wels. 722.

² *Deverell v. Bolton*, 18 Ves. 505.

³ *Hall v. Betty*, 5 Scott, N. R. 508.

CHAPTER XIII.

TITLE TO THE PROPERTY SOLD. PARTIAL FAILURE OF TITLE.

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|---|---|
| 1. Partial defect of title, what constitutes.
2. When it is no ground of objection by the vendee.
10. <i>Compensation</i> for partial failure of title. | 14. When ground for rescinding the sale.
26. Whether <i>the vendor</i> may object on the ground of deficiency or excess in the property. |
|---|---|

1. QUESTIONS often arise, as to the effect of a *partial* failure of title to the property sold. Such failure may apply to the *interest* of the vendor in the estate itself, as where he owns less than a fee simple, or a fee simple subject to incumbrance; or to the *amount or quantity* of the property, as where only a *part* of the lands sold belongs to him. And it may depend upon different combinations of circumstances, whether the purchaser shall be allowed to make any objection on these grounds; whether he shall be restricted to a proportional deduction from the agreed price; or whether he may at his election wholly rescind the bargain.

2. As has been seen, (Chap. 12,) Chancery will not decree specific performance of a contract to purchase, where the vendor is unable to give a valid title, unless it appears from the contract, that the understanding of the parties was, that the purchaser should take the risk of the title.¹ But specific performance will be decreed, when the vendor is able to perform his agreement *in substance*, although there is a trifling variation in the description, or a trifling incumbrance on the title, which cannot be removed, but which is a proper subject of compensation. Thus it is no valid objection to the title, that the conveyance, under which the vendor holds, contains

¹ *Winne v. Reynolds*, 6 Paige, 407.

a reservation of mines and minerals and water privileges, if there is no reason to suppose they exist. So, the reservation of a pepper-corn, or any other rent which is merely nominal, is not a valid objection to the title of the vendor, more especially if known to the vendee; and specific performance will be decreed without compensation, although by mistake of the scrivener they were not excepted in the written contract of sale. But a restriction upon the power of alienation, or the reservation to the original owner of a preëmptive right of purchase for a certain time, is an incumbrance, which diminishes the value of the title. And a purchaser without notice will not be compelled to take the premises, subject thereto, without a proper allowance.

3. The vendor of a farm in the manor of Rensselaerwick, held under a lease at a nominal rent of a pound of wheat, with a reservation of mines and minerals, and water privileges, and a preëmptive right of purchase; covenanted to give the purchaser a good and lawful deed. Held, the rent was no objection to the title; and, there being no mines or minerals or water privileges on the premises, and the lessor having agreed to relinquish his preëmptive right, of which the vendee had notice at the time of sale, a specific performance was decreed.¹

4. Agreement, to sell and assign "the unexpired term of eight years' lease and good-will" of a public-house. Held, the purchaser could not refuse to perform the agreement, on the ground that, when it was entered into, there were only seven years and seven months of the term unexpired.² So a purchaser is not entitled to abatement for a deficiency in quantity, where the particulars describe the estate as containing by estimation a certain number of acres, be the same more or less.³ More especially where the purchase is made by metes and bounds, estimated to contain a specific quantity, or "for more or less," and a gross sum to be paid for the

¹ *Winne v. Reynolds*, 6 Paige, 407.

³ *Winch v. Winchester*, 1 Vez. & B.

² *Belworth v. Hassell*, 4 Camp. Ca. 375.
140.

entire tract; and the land, at the time of purchase, is of equal value to the price paid;—unless there is some misrepresentation or concealment.¹ So, where land is sold at auction in separate lots, and several are purchased by one person, this is not an entire contract; and, though the vendor cannot give a title as to all the lots, the vendee cannot rescind the agreement *in toto*, but must take a conveyance of the rest.² (See p. 243.) So the vendor of a large tract, consisting of various parcels, as surveyed by the government, at a gross price, and not by the acre; and guilty of no fraudulent concealment; is not liable for any deficiency of quantity.³ So, where a specified tract is sold for a sum in gross, the boundaries control the description of the quantity; and neither party can have a remedy against the other, for an excess or deficiency in the quantity; unless it is so great as to furnish evidence of fraud or misrepresentation. Otherwise, where the mistake is in the boundaries, and not in the quantity. So where the deficiency is not in the thing described, but in the ability of the defendant to convey the thing described.⁴

5. A. sold to B. three quarter sections of land for \$1,000 each, and gave him a title-bond for two hundred and eighty acres, and a deed for the balance. B. gave, for the price, three notes, for \$1,000 each, payable at different times; the two first absolutely, and the last on condition of receiving a full title. A. afterwards conveyed one hundred and twenty acres, transferred all the notes for value, became insolvent, and left the State without making or being able to make title to the remaining quarter section. Held, the condition of the last note operated as an indemnity against any damage arising to B. from not receiving such title; and, as the title was not proved defective, that the *bonâ fide* payment by B. of the note first due, and afterwards of the conditional note, with notice of the transfer of the second note, did not entitle him to relief in equity against the latter note.⁵

¹ Ketchum v. Stout, 20 Ohio, 453.

² Van Eps v. Schenectady, 12 Johns. 436.

³ Terrell v. Kirksey, 14 Ala. 209.

⁴ Voorhees v. De Meyer, 2 Barb. 37.

⁵ Graham v. Nesmith, 18 Ala. 763.

6. Copyhold and freehold lands, lying intermixed and undistinguishable, were sold, with the timber. The vendor was not to be bound to distinguish the freeholds from the copyholds, and the timber was to be taken at a specified valuation of the timber on each lot. A deposit was paid of £10 per cent. It was also stipulated, that, in case of delay in the completion of the purchase, interest, at £5 per cent., should be payable on the whole price. Held, an entire contract,—not two contracts, one for the sale of land, and another of timber.¹ Also, that the purchaser was not entitled to any abatement, though he could not cut a single tree, not being able to distinguish any one tree as standing on freehold ground. Also, that in case of one lot sold under the same conditions and particulars, and which consisted entirely of copyholds, the purchaser was equally bound to pay the stipulated price for the timber, although he could not cut any of it.²

7. An estate, consisting of fen land, and so described in the particular of sale, was charged by a local but public act of Parliament with drainage and embanking taxes, of which the purchaser had no express notice. Held, that he was not entitled to a compensation for those taxes.³ So an injunction was granted, to stay an action against the auctioneer for the deposit, although the estate sold was represented as freehold, and turned out to be almost all leasehold, and although there had been great delay in making out the plaintiff's title.⁴

8. A piece of ground being sold at auction, according to certain metes and bounds, which were shown to the purchaser before his purchase, be the same more or less; he is not entitled to compensation for a deficiency; although the previous advertisement described the tenement as containing more than the actual quantity. So, notwithstanding a subsequent agreement under seal, (written by the purchaser, and signed by the vendor, for the purpose of binding the

¹ *Crosse v. Lawrence*, 10 Eng. Law & Eq. R. 7.

² *Ibid.*

³ *Barrandos v. Archer*, 2 Simons, 433.

⁴ *Fordyce v. Ford*, 4 Bro. C. C. 494.
But see *Drewe v. Corp.*, 9 Ves. 368.

vendor to make a title,) in which the terms of sale are referred to, but the quantity mentioned in the advertisement is specified, omitting the words "more or less;" the vendor may still prove the terms of sale by parol testimony.¹

9. Trustees for sale of a manor described it in advertisements, and particulars and conditions of sale, as a manor in which the fines were arbitrary; adding, that the clear profits, on an average of the last eight years, had been £150 per year; and it was one of the conditions of sale, that if there should be any error or misstatement in the particulars, the vendors or purchaser, as the case might happen, should pay or allow a proportionate value, according to the average of the whole purchase-money, as a compensation either way. After the sale, it was found that by the custom of the manor, arbitrary fines were payable only on alienation, and that on the death of a tenant, his customary heir paid, upon admittance, a small fixed sum, and the widow was admitted to her free bench without any payment. It was also found that the clear profits exceeded £200 a year. Held, (on a bill by the purchaser for specific performance, with compensation in respect of the misstatement as to the fines,) he could not claim compensation, inasmuch as the annual profits, which constituted the substantial value, far exceeded the amount stated.²

10. Although a court of equity does not ordinarily exercise its jurisdiction by awarding *damages*, yet in the class of cases now under consideration, for the purpose of effecting substantial justice between the parties, it sometimes departs from its usual course of procedure, and, instead of rescinding a contract for partial failure to fulfil it, seeks to indemnify the purchaser by decreeing a fair and equitable compensation for his loss. It has been said, the plaintiff in a bill for specific performance is not entitled, *generally*, to damages for non-performance, to be ascertained by an issue, or a refer-

¹ Grantland v. Wight, 2 Munf. 179.

² White v. Caddon, 8 Clark & Finnelly, 766.

ence to the master.¹ But the prevailing doctrine now is, that specific performance will be decreed upon the principle of *compensation and indemnity*, where there is no *substantial* deviation from the contract.² Thus a small incumbrance, which may be the subject of compensation, is no objection to a specific performance.³ So *quit rents*, being incidents of tenure, are proper subjects of compensation. It has been doubted whether the same principle applies to *rent charges*, which are not incidents of tenure; though the Court has allowed them, when small, to be subjects of compensation.⁴ So, if there be a small deficiency in the land, a reference may be made to the master to ascertain it, and report the value.⁵ So where the objection by a purchaser applies only to a small part of the estate.⁶ Thus, where a tenant in possession purchased the property, which was represented to be forty-six feet in depth, but turned out to be thirty-three only: Held, he was entitled to an abatement.⁷ So where the title is good except as to a small portion, the loss of which would not materially affect the value of the rest; equity will not rescind the contract, but will credit upon the bonds the value of such portion.⁸ So a purchaser of two lots cannot refuse to take one, because a good title is not shown to the other.⁹ So the general rule of specific performance, that the purchaser shall have what the vendor can give, with an abatement of price for deficiency in the quantity, was enforced against trustees for infants, upon the mere mistake of their agent, without fraud, &c.; but the relief adapted to the justice of the case, viz: the purchase being of wood upon a gross valuation, without regard to the quantity of land, an abatement for a deficiency of quantity, from erroneously inserting the hedges and fences not included in the purchase,

¹ Todd v. Gee, 17 Ves. 273.

² Horniblow v. Shirley, 13 Ves. 81;
Dyer v. Hargrave, 10 Ves. 505.

³ Guest v. Homfray, 5 Ves. 818.

⁴ Esdaile v. Stephenson, 1 Sim. & Stu.
122.

⁵ Cannon v. Mitchell, 2 Desaus. 320,

⁶ M'Queen v. Farquhar, 11 Ves. 467.

⁷ King v. Wilson, 6 Beav. 124.

⁸ Tomlinson v. Savage, 6 Ired. Eq.
430.

⁹ Lewin v. Guest, 1 Russ. 325. See
Roots v. Dormer, 4 Barn. & Ad. 77.

was directed with reference to land merely, not wood-land.¹ So, where there was a defect of title to a small piece of land, over which lay the approach to a house and other land, the main subject of purchase; and the contract provided for compensation, in case of any omission or mistake in the description; held matter of compensation.² So, in case of a contract to purchase lots, to two of which a title could not be made, and the others having deteriorated in value; if the value of the remaining lots is not affected by that deterioration, a specific performance shall be decreed as to all but two.³ So where there was an auction sale of lots, under condition that they were subject to the perpetual payment of £120 a year to the curate of N., but that this, and the perpetual annual payment of £20 to the hospital of C., were in future to be charged upon and paid by the purchaser of lot 1 only; held, the purchasers of the other lots were entitled, not to an absolute discharge, but to an indemnity from the purchaser of lot 1.⁴ So where it is provided by the conditions of sale by auction, that, if any mistake be made in the description of the premises, or any other material error shall appear in the particulars of sale, such mistake or error shall not annul the sale, but a compensation shall be made; the vendee is not released by a misdescription in the particulars, obvious, on inspection of the premises, unless wilful and designed.⁵ So an advertisement described the estate as all freehold, though a small part was held at will: after execution of articles, a treaty for an exchange of that part took place; pending which, at the time appointed for completing the purchase, the purchaser took possession forcibly; but proceeded in the treaty afterwards, till he finally refused to agree to the purchase. On a bill of the vendor, the purchase-money was decreed to be paid, with four per cent. from the

¹ *Hill v. Buckley*, 17 Ves. 394.

⁴ *Cassamajor v. Strobe*, 1 Wils. Cha.

² *Fraser v. Hess*, 17 Eng. Law & Eq. Ca. 428; 2 Swanst. 347.

154.

⁵ *Wright v. Wilson*, 1 Moo. & Rob.

³ *Poole v. Shergold*, 2 Bro. C. C. 118; 207.

¹ *Cox*, 273.

time it ought to be paid ; but an inquiry was directed, what ought to have been the compensation at that time, that, with the outgoing, to be deducted.¹ So it has been held, that where part of the premises are subject to tithes, though represented as tithe-free ; the purchaser, if he chooses to take the purchase, has a right to compensation, but not to compel the vendor to purchase the tithes.² In another case it is decided, that the purchaser of an estate, sold as tithe-free, cannot be compelled to take it subject to tithe, on terms of compensation ; but, an estate of an hundred and forty acres being sold under a decree, and the particulars stating about thirty-two acres to be tithe-free, and no evidence of exemption having been produced on the reference of the title, the master was directed to certify the proper amount of compensation.³ (a) So specific performance of a sale was decreed, with compensation, notwithstanding a variance from the description, though a minute examination might have discovered the defects ; as in the state of the house and the cultivation of the land. Otherwise as to a variance from the description, as lying *within a ring-fence* ; this being an object of sense ; and, upon the evidence, the purchaser being apprised of it.⁴ So a reservation of salt-works, mines, &c., in 1704, with a right of entry, though there was no instance of any claim, and the title had been transferred in 1761, without such reservation, upon the usual covenants ; was held an objection, giving a right to compensation ; the purchaser not insisting upon it further.⁵

¹ Calcraft v. Roebuck, 1 Ves. 221.

² Todd v. Gee, 17 Ves. 273.

³ Binks v. Rokeby, 12 Swanst. 226.

⁴ Dyer v. Hargrave, 10 Ves. 505.

⁵ Seaman v. Vawdrey, 16 Ves. 390.

(a) Even where the principal subject of contract was all the corn and hay tithes of a parish, and half of the latter was allotted to the vicar, and the other half commuted for a customary payment ; the nature of that payment, the extent of meadow, and the possible conversion from arable, not distinctly appearing, the injunction against recovering the deposit was continued after answer. *Drewe v. Hanson*, 6 Ves. 676.

11. By the particulars of a sale by auction, at which the defendant was declared the purchaser of lots 1, 2, 3, and 4; lot 1 was described as comprising seventy acres, twenty-four perches, more or less, and lots 2, 3, and 4, as comprising together three hundred and twenty-one acres, two roods, thirty perches, more or less; and by the conditions of sale it was provided, amongst other things, that any mistake or error in the description of the property should not annul the sale, but should be the subject of compensation, to be given or taken, as the case might require. A map or plan was annexed to the particulars, in which the different lots were distinguished by different colors. After the sale it was found, that lot 1 comprised eighty-nine acres, and twenty-nine perches, and lots 2, 3, and 4, only three hundred and ten acres, three roods, and eighteen perches. The error had arisen from the adoption of a former surveyor's report. Held, the purchaser was bound to make compensation to the vendors, on account of lot 1, and entitled to receive compensation on account of lots 2, 3, and 4.¹

12. A vendor agreed to sell and convey "lots Nos. 9 and 11 in No. 20 in great lot No. 34, one hundred and eighty-seven and a half acres for \$750;" supposing that lot No. 11 contained one hundred and forty-three and a half acres; but through an error of the surveyor, who subdivided great lot No. 34, in extending his survey beyond the north boundary of that lot, whereby he included with lot No. 11 of his subdivision forty-three and a half acres of a gore lying north of that lot; lot No. 11 really contained but one hundred acres, and the quantity embraced in lots 9 and 11 fell short of the agreement forty-three and a half acres; by reason of which error, the vendor was unable to make a good title to the whole quantity of land. On a bill by the assignees of the vendor for specific performance; held, that it was a case of mutual mistake, in relation to the quantity of land contained in the two lots; and a decree was made, directing a specific

¹ *Leslie v. Thompson*, 5 Eng. Law & Eq. R. 166.

performance, by the vendor, so far as he was able to perform, and providing for an abatement from the purchase-money on account of the deficiency.¹

13. A contract having been made for sale of an estate, it afterwards appeared that there were several out-goings from the estate, which were not disclosed : yet, being matters which lie in compensation, held, the contract should be executed, with an allowance.² So compensation was decreed for the dry rot in a house and premises, upon representations of the vendor to the purchaser as to the state of repairs ; he relying upon such representations, and stating to the vendor that he did not employ a surveyor, for that reason.³ So where a tract of land is sold, as containing a given quantity of acres, but really includes a less quantity ; a deduction will be made ; unless the deficiency be such, as would have prevented the contract, if known at the time of the purchase ; that is, the deficiency appearing to be in that part which was the chief inducement to purchase.⁴

14. Although the rule above stated seems to be well established by the weight of authority ; it has been held in some cases, that equity will not compel a specific performance, unless the vendor can make a good title to *all the land sold*.⁵ A purchaser is said to be entitled to *the specific real estate which he contracts for*, and not to be compellable by a Court of Chancery to accept a part only, with a compensation for the deficiency.⁶ As, for instance, to take six undivided seventh parts of an estate, when he has contracted for the entirety.⁷ Or, it seems, nine sixteenths instead of the entirety ; especially where there is a lien on the estate for a debt nearly equal to the whole of the purchase-money.⁸ So, in case of a purchase under a decree of two sevenths of an estate in one lot ; there being a good title to only one one

¹ Voorhees v. DeMeyer, 2 Barb. 37.

² Howland v. Norris, 1 Cox, 59.

³ Grant v. Munt, Coop. 173.

⁴ Anderson v. Foulke, 2 Harr. & G. 346 ; Ketchum v. Stout, 20 Ohio, 453.

⁵ Hepburn v. Auld, 5 Cranch, 262,

275 ; Finley v. Lynch, 2 Bibb, 566 ; Tyree v. Williams, 3 Bibb, 366.

⁶ Cunningham v. Sharp, 11 Humph. 116.

⁷ Dalby v. Pullen, 3 Sim. 29.

⁸ Wheatley v. Slade. 4 Sim. 126.

seventh. Held, the purchaser was not bound.¹ So, where a contract was made to convey ten lots of land, and a tender of a deed for eight whole lots, and an equal undivided half of four other lots; held, not a performance.² So, although admitted to be generally, though not universally true, that a purchaser may take what he can get, with compensation for what he cannot have; it has been questioned whether that is ever done, without an express undertaking on his part, to do what the Court shall order.³ So, it is said, the doctrine of compensation has been carried too far. It is not to prevail, unless the party will substantially have that, for which he contracted.⁴ So, that *small mistakes or inaccuracies* in a contract are the subject of compensation; but that has been extended to a great length.⁵

15. In some cases, as has been seen, the Courts have laid down certain principles, upon which they will proceed, in determining whether a purchaser is entitled to a partial performance of the contract, with compensation for the deficiency, where the vendor has only a limited interest in the estate sold.⁶ In other cases, the Courts strongly set forth the difficulty of decreeing a partial performance in such case.⁷ It is held, however, that the Court will not *upon motion* determine, whether several lots, forming part of one estate and bought at the same sale by one purchaser, are or are not so intimately connected in use and enjoyment, that the failure of title as to one will furnish a defence against specific performance as to the rest. Such an objection raises a question of facts, which ought either to be put in issue upon the pleadings, or be the subject of a special reference to the master.⁸ So, it is held, that the Court must be affirmatively and clearly satisfied, that compensation will effect substantial justice, before making a decree therefor. Thus, a bill

¹ Roffey v. Shallcross, 4 Madd. 227.

² Roy v. Willink, 4 Sandf. Ch. 525.

³ Patou v. Rogers, 1 Ves. & Beam.
351; Halsey v. Grant, 13 Ves. 75.

⁴ Alley v. Deschamps, 13 Ves. 225.

⁵ Mortlock v. Buller, 10 Ves. 292.

⁶ Thomas v. Dering, 1 Kee. 729.

⁷ Graham v. Oliver, 3 Beav. 124.

⁸ Cassamajor v. Strode, 2 Myl. &
Kee. 724.

was filed for specific performance of a contract for an exchange of lands, which the defendant had refused to perform, on the ground of want of title to a small proportion of the land agreed to be conveyed to him. The plaintiff tenders a full and adequate compensation, to be ascertained by reference to the master. General demurrer, for want of equity. Demurrer allowed, because the bill did not clearly show, that the subject-matter of the suit was one palpably and obviously matter for compensation, and capable of being compensated.¹ So, where a party, acting as the absolute owner of property, and being absolute owner of part, and of the other part only tenant for life, with a power of sale, at his request and by his direction, vested in trustees, contracted to sell the whole; upon a bill by the purchaser for specific performance, an inquiry was directed, "whether the defendant could make a good title, or could, by application to the trustees, procure a good title to be made."²

16. In conformity with these views, it has been held that specific performance will not be decreed upon the principle of compensation and indemnity, in case of misdescription of the quantity of land, in regard to the acres being statute acres or customary. This is not matter of compensation, but a ground for setting aside the sale.³ So, no compensation will be ordered in a case of great intentional misrepresentation; although so provided by the conditions of sale, in case of "any error or misstatement" in the particulars.⁴

17. By particulars of sale, lot 13 was described as building ground, and the adjoining lot 12 as a villa, subject to liberty for the purchaser of lot 1 to come on the premises, to repair drains, &c., as reserved in lot 7. The reservation in lot 7 referred to a lease, which gave the occupier of that and several adjoining lots, composing a row of houses, a carriage way in common, in front of the lots, and a footway at the back, and also a footway over lot 13. The particulars con-

¹ *Bowyer v. Bright*, 13 Price, 698.

² *Graham v. Oliver*, 3 Beav. 124.

³ *Price v. North*, 2 Y. & Coll. 620.

⁴ *Stewart v. Attiston*, 1 Meri. 26.

tained plans, showing the carriage-way and the footway at the back, but not that over lot 13. But they stated that the lease of lot 7 might be seen at the vendor's office, and would be produced at the sale. Plaintiff having purchased lots 12 and 13 by one contract, in ignorance of the footway over lot 13; held, he might rescind the contract.¹

18. A. paid a deposit upon a contract for the purchase of the lease, &c., of a public house. It being afterwards discovered that the house was comprised with another in an original lease, under which the lessor had a right to reënter for breach of covenants, in respect of either house; held, that A was not bound to accept the title with an indemnity, but might recover back the deposit and expenses of investigating the title.²

19. So the purchase of several lots at an auction by one person, is an entire contract; especially if adjoining, and more conveniently occupied together; and, if the seller fails in making a title to any one of them, the purchaser may rescind for the whole.³ (See p. 233.) So, it seems, where one person is reported purchaser of several lots before the master, if the biddings are opened as to one, he shall have an option to open them as to all.⁴ So, the defendant having sold and conveyed land to the plaintiff, suggesting that he had a title, but in fact not being entitled to a part, the same being an encroachment from a common; though no eviction has happened or been threatened, a bill lies to set aside the conveyance, and for a return of the purchase-money and all expenses.⁵ So, specific performance of a purchase was refused, no good title being made to a part of the estate, which, though very small in proportion to the whole, was essential to its enjoyment; and the defendant, who was let into possession, being afterwards turned out by the plaintiffs.⁶

20. So it has been held, that a purchaser cannot be com-

¹ *Dykes v. Blake*, 4 Bing. N. C. 463.

⁴ *Boyer v. Blackwell*, 3 Anstr. 657.

² *Blake v. Phinn*, 3 Mann. Grang. & Scott, 976.

⁵ *Edwards v. M'Leay*, Coop. 318.

³ *Chambers v. Griffiths*, 1 Esp. Ca. 153.
⁶ *Knatchbull v. Grueber*, 1 Madd. 149; *Gibson v. Spurrier*, Peake, 49.

pelled, upon the principle of compensation, to take, under a contract for a freehold estate, a leasehold, though a very long term.¹ So, the Court refused to decree specific performance of an agreement, made twelve years before the hearing, to purchase the fee-simple of certain lands, and also the right to impound the water of a river, and divert a stream from it, because the vendor, though seised in fee of the lands, had only a lease for ninety-nine years of the other subjects of the contract, and had not, as against some of the proprietors of land on the banks of the river, a right to divert the water; and because the purchaser had entered into the contract, for the purpose of erecting a manufactory to be wrought by the water.²

21. Sale of a leasehold interest, described in the particulars as held for a term of twenty-three years, at a rent of £55, and as comprising a yard. One of the conditions was, that, if any mistake should be made in the description, or any other error whatever should appear in the particulars of the estate, such mistake or error should not annul or vitiate the sale, but a compensation should be made, to be settled by arbitration. The yard was not, in fact, comprehended in the property held for the term at £55, but from year to year, at an additional rent. It was also essential to the enjoyment of the other property. It did not appear that the vendor knew of the defect. Held, this defect avoided the sale, and was not a mistake to be compensated for, although, after the day day named for completing the purchase, and before action brought by the vendee, the vendor procured a lease of the yard for the term to the vendee, and offered it to him.³

22. The particulars of sale of certain leasehold premises in Covent Garden stated, that under the original lease "no offensive trade was to be carried on, and that the premises could not be let to a coffee-house keeper or working hatter."

¹ *Drewe v. Corp*, 9 Ves. 368. But see *Fordyce v. Ford*, 4 Bro. 494.

² *Wright v. Howard*, 11 Sim. & St. 190.

³ *Dobell v. Hutchinson*, 3 Ad. & Ell. 355.

The lease, in fact, prohibited the business of brewer, baker, sugar-baker, vintner, victualler, butcher, tripe-seller, poulterer, fishmonger, cheese-seller, fruiterer, herb-seller, coffee-house keeper, working hatter, and many others, and the sale of coals, potatoes, or any provisions. Held, the discrepancy entitled a purchaser to rescind his contract.¹

23. A lessee's bill for specific performance was dismissed; his interest, described as fifty years, the residue of a term, free from incumbrances, being a few years only of an old term, and a reversionary term from another lessor; and old incumbrances not shown to be discharged.²

24. A contractor for the purchase of an estate in fee-simple, in possession, free from incumbrances, died intestate, before completion of the contract. There proved to be an outstanding lease, for life, at a low rent. A bill was filed by the heir-at-law for specific performance, with an abatement for the lease, and seeking to have the purchase-money paid out of the personal assets of the purchaser. Held, the purchaser could not have been compelled to perform the contract, and the heir could not enforce it.³

25. Where, in articles of agreement under a penalty, there are mutual covenants to do certain acts, and also a covenant which goes to the whole consideration on each side; to an action for the penalty, the defendant may plead in bar a breach by the plaintiff of the covenant which goes to the whole consideration. Thus, an agreement for the sale of lands provided, with penalty, that the seller should take in part payment certain lands of the buyer, and that all timber trees, then upon any of the estates, should be valued by appraisers, and paid for by the respective purchasers at a given time. To an action of debt by the seller for the penalty, the buyer may plead that the plaintiff, before the time, cut down trees, and thereby rendered himself unable to perform the agreement.⁴

¹ *Flight v. Booth*, 1 Bing. N. C. 370.

⁴ *Duke of St. Albans v. Shore*, 1

² *White v. Foljambe*, 11 Ves. 337.

H. Blackf. 270.

³ *Collier v. Jenkins*, You. 295;
Tucker v. Woods, 12 Johns. 190.

26. While *the vendee* may object to completion of the sale, on the ground of *deficiency* in the property sold; the question sometimes arises whether *the vendor* can raise a similar objection, where the property claimed either falls short of or *exceeds* that contracted for. Upon this subject it has been held, that *a vendor*, representing and contracting to sell the estate as his own, cannot object that he has only a partial interest. The purchaser is entitled to as much as he can have, and an abatement.¹ So, defect of title to a considerable part of the estate, though a good objection by *the purchaser* to a specific performance, is not such by *the vendor*.²

27. But in the following case A. was beneficially entitled, under his marriage settlement, to an estate for his life, and to the ultimate reversion in fee in default of issue male; and the trustees of the settlement had a power to sell, at his request and by his direction. There being issue of the marriage, A., acting as absolute owner, contracted to sell the estate to B., but the trustees afterwards refused to concur in the sale. Held, on a bill, the purchaser was not entitled to have the contract performed to the extent of the vendor's interest, by a conveyance of his life-estate and his ultimate reversion.³

28. It has been held, that the vendor, as well as the vendee, may have the benefit of the rule of *compensation* in equity, where the property conveyed exceeds, instead of falling short of, that contracted for. Thus, in *King v. Hamilton*,⁴ the Court, in giving their opinion, state the case substantially as follows. Bill for specific performance. The bill states, that there is a surplus of several hundred acres, and by actual measurement it is found to be eight hundred and seventy-six acres (the patent having been granted for one thousand five hundred and thirty-three and one third acres) beyond the quantity mentioned in the contract. It is a fact of general notoriety, that the surveys and

¹ *Mortlock v. Buller*, 10 Ves. 292.

³ *Thomas v. Deering*, 1 Kee. 729.

² *Western v. Russell*, 3 Ves. & Beam.
187.

⁴ 4 Pet. 311.

patents for lands, within the Virginia military district, contain a greater quantity of land than is specified in the grants. Parties, when purchasing land in that district, and referring to the patent for a description, of course expect that the quantity would exceed the specified number of acres. But so large an excess can hardly be presumed to have been within the expectation of either party. And, admitting that a strict legal interpretation would entitle the purchaser to the surplus, whatever it might be, it by no means follows, that a Court of Chancery will in all cases enforce specific performance of such a contract. The powers of a Court of Chancery to enforce specific execution are very valuable and important; for, in many cases, where the remedy at law for damages is not lost, complete justice cannot be done without a specific execution. And it has been almost as much a matter of course for a Court of Equity to decree specific execution of an unobjectionable contract for the purchase of lands, as it is to give damages at law where an action lies. But this power is to be exercised under the sound discretion of the Court, with an eye to the substantial justice of the case. If this large surplus should be taken as included in the original purchase, it might well be considered a case of gross inadequacy of price. The Court decreed a conveyance of the surplus, the vendee to pay for the same at the average rate per acre, with interest, which the consideration-money mentioned in the contract bore to the quantity of land named.¹

29. But where the plaintiff brought a bill in equity, supposing that more lands passed by his deed than was intended; the defendant being a purchaser upon valuable consideration, held, the Court would give no relief.²

¹ See *Cathcart v. Robinson*, 5 Pet. S. C. 264.

² *Clifford v. Laughton*, Toth. 83.

CHAPTER XIV.

REFERENCE OF TITLE.

1. Questions of title, when, and how referred. Forms of proceeding.

1. IN suits relating to the sale and purchase of lands, more especially where a bill is brought for specific performance, and in case of any doubt or difficulty, Equity adopts the practice of a *reference* of the title, for the purpose of determining upon its sufficiency, and making a return or report to the Court.¹ Thus after an answer, submitting to perform the contract, if a good title can be made, a reference will be directed by decree, or by order on motion, whether a good title can be made; and whether it appears upon the abstract.² So, on a bill filed by a vendor for specific performance, the purchaser insisted that the contract had been abandoned; but failing in this defence, he was ordered to pay the costs up to the hearing, and the usual reference was made as to title.³ But, if the bill and answer clearly show that no title can be made; reference will not be ordered.⁴ So, on the other hand, specific performance was decreed against a purchaser, without reference as to the title; upon possession, and no objection made to the abstract.⁵ So, upon possession; a correspondence; and no objection to the title till two years after the abstract was delivered.⁶

2. When an inquiry as to title is directed, it is not necessary to carry in a *state of facts*, but the master proceeds upon

¹ M'Comb v. Wright, 4 Johns. Ch. 659.

² Wright v. Bond, 11 Ves. 39; 2 Dan. Ch. Pr. 1462; Winterbottom v. Ingham, 9 Sim. 654.

³ Taylor v. Brown, 2 Beav. 180.

⁴ Frost v. Brunson, 6 Yerg. 36.

⁵ Fleetwood v. Green, 15 Ves. 594.

⁶ Margravine, &c. v. Noel, 1 Madd. 310.

the abstract,¹ unless the purchaser insists upon production of the title-deeds.²

3. As has been suggested, reference of title may be made *on motion*. An order thus made ought to contain directions for the production of deeds, &c., and for the examination of the parties on oath.³ And the master, (under Lord Lyndhurst's 51st order,) has the same power to examine witnesses, as he would have had if the reference had been made by decree.⁴ When reference is thus made, *further directions* may be obtained by motion.⁵

4. In suits for specific performance, every thing connected with the title may be the subject of the usual reference, upon motion as to the title, and may be added, by way of inquiry, to that reference; but the Court will not allow inquiry as to other matters, nor decide upon any matter of relief not admitted by the answer.⁶ The reference may inquire, whether it appeared by the abstract in the pleadings mentioned, that a good title could be made.⁷ Upon motion for a reference of title, where performance is resisted on other grounds than the title, the Court will determine by the answer whether those grounds are substantial or frivolous.⁸ If substantial, the motion will be denied.⁹ If not substantial, the Court will order a reference; as where the ground was, that the time of possession had been made of the essence of the contract, which, on examination, appeared not to be the case.¹⁰ So, upon a bill filed by the vendor for specific performance, it appeared that the defendant, in the course of correspondence between the solicitors, and upon a case stated on his part for the opinion of counsel, expressed himself willing to accept the title, if a particular objection were removed. That

¹ 2 Dan. Ch. Pr. 1462.

² 2 Dan. Ch. Pr. 1463; Poole v. Shergold, 1 Cox, 160.

³ Winterbottom v. Ingham, 9 Sim. 654.

⁴ Woodroffe v. Titterton, 8 Sim. 238.

⁵ Whitcomb v. Foley, 6 Madd. 3.

⁶ Bennett v. Rees, 1 Keen, 405; Moss v. Matthews, 3 Ves. 279.

⁷ Jennings v. Hopton, 1 Madd. 211.

⁸ Withy v. Cottle, Turn. & Rus. 78; Boyes v. Liddell, 1 You. & Col. 133.

⁹ Blyth v. Elmherst, 1 Ves. & B. 1; Morgan v. Shaw, 2 Mer. 138; Gonpertz. 12 Ves. 17; Paton v. Rogers, 1 Ves. & B. 351.

¹⁰ Boehm v. Wood, 1 Jac. & W. 419.

objection not being removed, the bill was filed. Held, the reference to the master must be general, and not confined to this objection.¹

5. Somewhat contrary to the above practice, where a motion was made, after bill filed, and before answer, for a reference as to title; the counsel for the defendant saying, there were other matters in question besides the title; the motion was refused.² So, where there was a further subject of dispute, beyond the title, under a claim of *compensation*, reference was refused with costs.³ So there will be no reference of title, upon the question whether the estate was *tithe-free*, having been sold as such.⁴ So, where the purchaser, besides objecting to the title, claimed compensation for defect of quantity; even though he submitted to complete his agreement.⁵

6. If exceptions to the report of a good title are overruled, other objections cannot be made; otherwise, if exceptions are allowed, and a new abstract delivered.⁶

7. Where the answer to a bill for specific performance raises any other objection than defects in the title, on a motion for reference, after answer, it seems, the Court will not inquire whether the objections be frivolous, but reserve the matter to the hearing.⁷

8. A bill prayed specific performance "if a good title could be made." At the hearing it was declared, that the agreement ought to be specifically performed, and referred to the master to inquire, whether a good title could be made. The master reported in the negative. The plaintiff, on further directions, waived all objections to the title, and proposed to take the property; but the vendor objected. Held, the plaintiff was entitled to a decree; but, being aware, at the first hearing, of the objections to the title, he ought to pay the costs of the investigation in the master's office.⁸

¹ *Lesturgeon v. Martin*, 3 My. & Kee. 255.

² *Matthews v. Dana*, 3 Madd. 470.

³ — *v. Skelton*, 1 Ves. & Bea. 517.

⁴ *Wallinger v. Hilbert*, 1 Mer. 104.

⁵ *Lowe v. Manners*, 1 Mer. 19.

⁶ *Brooke v. —*, 4 Madd. 212.

⁷ *Withy v. Cottle*, 1 Sim. & Stu. 174.

⁸ *Bennett v. Fowler*, 2 Beav. 302.

9. Injunction to restrain a purchaser from proceeding at law, to recover part of the purchase-money paid by him in advance, for want of title, and outstanding incumbrances. Held, the Court would not make absolute the common order *nisi* to dissolve the injunction, without the master's report upon the title, although the objections were fully stated in the defendant's answer.¹

10. The Court will not, on motion, after an order for a reference, the master having found that a good title can be made, direct him to inquire when such title could first be made. Such direction should be applied for at the hearing on the merits.² But, in case of a decree for reference upon the title, the cause coming on for further directions, after a report approving the title, the defendant was held entitled to an inquiry, at what time a title could have been made.³ Bill for specific performance, filed by the vendor. On a reference of title, the master having reported that a good title could be made, an order was passed, referring it back to him, to see whether such title could have been made prior to the filing of the bill.⁴ But the inquiry, at what time a title could be made, is a proper subject of further directions after the report upon the title; and not to be combined with the reference of title.⁵

11. A reference having been made as to title, on one motion, the party cannot afterwards, by another motion, have a reference as to the delivery of the abstract.⁶

12. Bill for specific performance, against a purchaser. The defendant, admitting that he had been for several months in possession, and had exercised acts of ownership, on the faith that a good title to three hundred and forty-nine acres would be shown, insisted, that, in the contract, *acres* meant *statute acres*, and that he was not bound unless three hundred

¹ Church v. Legeyt, 1 Pr. 301.

² Lubin v. Lightbody, 8 Price, 606.

³ Daly v. Osborne, 1 Mer. 382.

⁴ Birch v. Haynes, 2 Mer. 444; 3 Madd.

⁵ Gibson v. Clarke, 2 Vcs. & Bea. 103.

⁶ Hyde v. Wroughton, 3 Madd. 279.

and forty-nine statute acres were conveyed to him. Held, a reference of title would not be directed on motion. It seems, the clause, "be the same more or less," would not cover so large a deficiency.¹

13. Reference of title before answer; the plaintiff, the vendor, undertaking to do all such acts, for the purpose of executing what the Court thinks right, as if the answer were in, and the cause brought to hearing. Direction, if the report shall be against the title, for compensation; but refused as to indemnity.²

14. On a report against the vendor's title, his bill for specific performance was dismissed, with costs, on motion.³ But an order to dismiss a bill for want of prosecution is not of course, pending a reference on motion; the title alone being in question.⁴ But where, in a suit by a vendor for specific performance, the master reported in favor of the title, but the Court, on exception, deemed it doubtful; an order was made, dismissing the bill, without costs, but neither allowing nor disallowing the exception.⁵

15. Where the report is in favor of the title, the Court, on allowing exceptions to it, will give the vendor a reasonable time to remove the objection, although the exceptions and further directions were set down to come on together.⁶

16. On a motion by a vendor against a vendee in possession, for a reference to set an occupation rent, the title not being completed, an order was accordingly made, and that interest at £5 per cent., upon the deposit, should, under the circumstances, be deducted out of such rent.⁷

17. Upon a question of title, as to specific performance, further evidence may be produced on both sides before the master.⁸

18. One general exception was taken to the master's re-

¹ *Portman v. Mill*, 2 Russ. 570.

² *Balmanno v. Lumley*, 1 Ves. & Bea. 491.

³ *Walters v. Pyman*, 19 Ves. 351; *Bennett v. Carey*, 3 Bro. 390.

⁴ *Biscoe v. Brett*, 2 Ves. & Beam. 377.

⁵ *Wilcox v. Bellares*, Turn. & Russ. 491.

⁶ *Portman v. Mill*, 1 Russ. & Myl. 696.

⁷ *Smith v. Jackson*, 1 Mad. 618.

⁸ *Vancouver v. Bliss*, 11 Ves. 458.

port of a good title, which did not point out the objections to the title. The Court disapproved of this inconvenient mode of proceeding.¹

19. Where, on reference as to title, in a suit against a purchaser for specific performance, the master reports in favor of the title, but the Court holds it to be so doubtful, that the purchaser should not be compelled to take it; the bill may be dismissed, without allowing the exceptions taken by the defendant to the report.²

20. Leave was given, under the circumstances, to except to a report, although the party had not carried in objections to it.³

21. A purchase before the master is not complete, before confirmation of the report. Therefore a loss by fire, after the report, but before confirmation, falls upon the vendor; although the sale was delayed by the purchaser's having opened the biddings.⁴

22. After a report, which was confirmed, in favor of a title, by one master, another master, in another proceeding, made a report, by which the title was affected. On motion, the title was referred back to the former master.⁵

23. If, upon a question of title, the master is satisfied with the evidence, but, upon the hearing of an exception to the report, the Court thinks the evidence not sufficient, the Court, upon the application of the vendor, even though for some time delayed, will refer it back to the master to review his report, in order to give the vendor an opportunity of producing further evidence.⁶

24. The plaintiff, holding a contract for the purchase of land, sold the land to the defendant; and, upon the defendant's failure to fulfil his contract, files a bill for specific performance. The case was referred to a master, to report

¹ *Flomer v. Hartopp*, 6 Beav. 476.

² *Robinson v. Milner*, 1 Hare, 578, n.

³ *Wood v. Lambirth*, 9 Sim. 195.

⁴ *Ex parte Minor*, 11 Ves. 559.

⁵ *Jeudwine v. Alcock*, 1 Madd. 597.

⁶ *Andrew v. Andrew*, 3 Sim. 390;
Egerton v. Jones, 3 Sim. 392.

whether the plaintiff could make a good title. The report was favorable, and the defendant excepted. Held, the report followed the reference, though it should properly show how title could be made; and specific performance was decreed.¹

¹ *Scott v. Thorp*, 4 Edw. Ch. 1.

CHAPTER XV.

TITLE DEEDS.

1. IN the English law, *the deeds*, under which a title to real property is derived or claimed, constitute an important subject of inquiry, and give rise to numerous and nice questions. And although, in the United States, where the system of *registration* universally prevails, the rules upon this subject cannot be considered as generally in force; still, a comprehensive view of the law of vendors and purchasers requires that they should be summarily noticed.

2. In England, it is the settled rule of law, that a purchaser of real property is not bound to complete his purchase without the title deeds, unless he has a legal covenant to produce them.¹ And by analogy to this rule it is held, that a vendee is not bound to accept the title, unless the deeds under which it is deduced are regularly recorded; there being no other proof of their execution.² But, where a party binds himself to execute a deed to another, he is bound to deliver or tender it to him; the acknowledgment of it before the clerk of the county court, and deposit of it with him for the benefit of the grantee, are no performance of his obligation.³

3. While the title deeds must themselves be produced, a good title also requires the production of extraneous evidence of the facts stated in the deeds; even though the purchaser makes no requisition therefor.⁴ A vendor must produce all evidence necessary to verify the title, beyond the title deeds in

¹ Barclay v. Raine, 1 Sim. & Stu. 449.

² Bartlett v. Blanton, 4 J. J. Marsh. 428.

³ McFadgen v. Eisensmidt, 10 Humph. 567.

⁴ Sherwin v. Shakspeare, 23 Eng. Law & Eq. 199.

his own custody, unless his intention to the contrary be previously made known to the purchaser in clear and explicit terms.¹ If a vendor retains the title deeds, and covenants for further assurance only, the purchaser may compel him to covenant for production of the deeds.² But a purchaser is not entitled, as a matter of course, to a covenant for the production of all documents contained in the abstract of title, which are not delivered to him; but only of those which are necessary to make out a good sixty years' title.³

4. Although conditions of sale provide, that no earlier or other title should be deduced, or any deed or document produced, anterior to a specified document; the vendee is not precluded from making an objection to the title, which appears on the face of the abstract delivered.⁴

5. A purchaser, who cannot have the *original* title deeds, the estate being sold in a great number of lots, is entitled to *attested copies* at the expense of the vendor, notwithstanding the inconvenience and expense.⁵ (a) So, where title deeds cannot be delivered, *assignees* must, like any other vendor,

¹ Southby v. Hutt, 2 Myl. & Cra. 207.

² Fain v. Ayers, 2 Sim. & Stu. 533.

³ Cooper v. Emery, 1 Phil. 388.

⁴ Sellick v. Trevor, 11 Mees. & Wels.
722.

⁵ Dare v. Tucker, 6 Ves. 459; Ward v. Garmons, 17 Ves. 134; Boughton v. Jewell, 15 Ves. 176.

(a) But, on the other hand, a purchaser is not bound to put up with copies, where the originals can be had. Thus, the vendor of copyhold, enfranchised in 1799, delivered to the purchaser two abstracts commencing in 1736, one of title to the land and the other of the title to the manor. The deed of 1799, which was forty years old, recited, that the then lord and the then owner of the land were respectively seised in fee; and several of the deeds relating to the lord's title were bargains and sales enrolled, and therefore, copies of them, as well as of the surrenders and admittances, which would be good evidence, might be procured by the purchaser at any time. The vendor was unable to deliver to the purchaser the deed of 1799, or any of the prior instruments, but was willing to covenant to produce that deed. Held, that he was bound to give the purchaser covenants for the production, not only of that deed, but of all the prior instruments mentioned in the abstracts. Cooper v. Emery, 10 Sim. 609.

give attested copies of them at the expense of the estate ; but their covenant for the production of the deeds should be confined to the time of their continuance as assignees.¹

6. Objection to a title for want of a deed, which had been enrolled at a public office, but could not be found. A copy of it, taken in 1632, attested to be a true one by five witnesses, was produced in Court. Lord Hardwicke was of opinion, that this would have been sufficient, even without an attestation.²

7. If, after a sale, but before the title is accepted, the title deeds be destroyed by fire, the Court will not compel specific performance, unless the vendor can furnish the means of showing their contents, and that they were duly executed and delivered.³

8. While a title depending on deeds must generally be verified by the production of them ; still a good title may be made, although the origin cannot be shown by any deed or will ; if there has been such a long, uninterrupted possession and enjoyment of, and dealing with, the property, as afford a reasonable presumption, that there is an absolute title in fee simple.⁴ And it has been held, that the Court will compel a purchaser to take a title, depending upon parol evidence of adverse possession under the statute of limitations.⁵ So where the plaintiff produces an original lease of a long term, and proves possession for seventy years, the mesne assignments shall be presumed.⁶ So the existence and execution of a settlement by indentures of lease and release were presumed from circumstances ; principally the existence of the drafts ; the statement in an abstract of the title ; and the existence of the lease for a year of other estates, appearing to have been included in the same plan of settlement.⁷

9. But, on the other hand, where a leasehold was sold, subject to a ground-rent, which was said to be apportioned

¹ *Ex parte Stuart*, 2 Rose, 215.

² *Harvey v. Phillips*, 2 Atk. 541.

³ *Bryant v. Busk*, 4 Russ. 1.

⁴ *Cottrell v. Watkins*, 1 Beav. 361.

⁵ *Scott v. Nixon*, 3 Dru. & War. 388.

⁶ *Earl v. Baxter*, 2 Blackst. 1228.

⁷ *Ward v. Garmons*, 17 Ves. 134.

out of a larger rent, but the apportionment was not evidenced by any existing deed, but only by the acceptance of a mesne landlord, and presumption; held, that the purchaser was not bound to accept the title.¹ So it has been held, that a vendor's showing an uninterrupted possession of twenty years in himself, and those under whom he claims, is not sufficient.²

10. Conveyance, in 1793, from persons residing in Bermuda, of lands then in their possession, and to which, subject to an outstanding but satisfied mortgage term, they claimed title under an entail created in 1732, through a descent recited in the deeds. A subsequent assignment of the mortgage term from the mortgagee to the purchaser, and uninterrupted enjoyment under his conveyance, will not enable him to make a good title; if unsupported by extrinsic evidence of the pedigree recited in the deeds, or of possession, prior to 1793, conformable to that pedigree.³

11. Where a title was derived from one who entered as heir, under the impression that his ancestor's will was void, a purchaser was not compelled to complete his contract, without production of the will, or evidence of its contents.⁴ But where one articles to buy land, and the title is under a will, not proved in equity against the heir; yet, in some cases, equity will compel the purchaser to accept the title.⁵

12. The *abstract* of title is one of the documents, upon which questions have often arisen between vendor and purchaser. Where the title and abstract are to be made at the vendor's expense, the purchaser is entitled to the custody of the abstract, until either the purchase is finally rescinded by consent, or declared impracticable by a court of equity. When the contract is determined, the abstract becomes the property of the vendor. If the sale proceeds, it is the property of the vendee. *An opinion* written thereon, as it was

¹ *Barnwall v. Harris*, 1 Taunt. 430.

² *Lewis v. Herndon*, 3 Litt. 358.

³ *Fort v. Clarke*, 1 Russ. 601.

⁴ *Stevens v. Guppy*, 2 Sim. & Stu. 439.

⁵ *Colton v. Wilson*, 3 P. Wms. 190.

necessarily written on the seller's paper by his consent, continues the property of the purchaser.¹

13. On reference of title to a master, he proceeds on the abstract only, unless the purchaser requires the deeds; and the latter cannot except to the report on this ground.²

14. Specific performance decreed; the abstract, though delivered very late, and under a notice that the vendee would insist on his deposit, with interest, if the title should not be made out, and possession delivered, by the time of payment, having been received and kept without objection; and the vendee, upon the construction and the circumstances, not being entitled to insist on the time, as of the essence of the contract.³

15. Conditions of sale of an estate sold in lots, that the vendor should deliver an abstract of the title to the purchasers, and deduce a good title; but, as to a part of the estate, acquired under an inclosure, he should not be bound to show any title thereto, prior to the award; that the vendor should deliver up, to the largest purchaser in value, all the title deeds and other documents in his custody, but not be required to produce any original deed or other documents than those in his possession and set forth in the abstract. Held, these conditions did not relieve the vendor from verifying the title shown upon the abstract, by producing the title deeds themselves, or, if any of them were not in his possession, by other satisfactory evidence.⁴

16. In 1745, J. executed a settlement of lands, reserving a power, with the consent of A., to revoke the uses. The abstract of title set forth a will of J., dated in 1761, whereby he, with the consent of A., revoked the uses; and it referred to a copy of the will. P., the son and heir of J., by indenture of 1763, reciting the will, resettled the estates; and possession had since gone accordingly. Held, the non-production of the will was not an objection to the title. In the

¹ *Roberts v. Wyatt*, 2 Taunt. 268.

² *Poole v. Shergold*, 1 Cox, 160.

³ *Selm v. Slade*, 7 Ves. 265.

⁴ *Southby v. Hutt*, 2 My. & Cr. 207.

same case, the abstract stated a deed of March, 1814, making a tenant to the *præcipe*, which recited articles of February, 1814, between the father, tenant for life, and his son, tenant in tail, empowering them to revoke the uses thereby declared; and the recovery was declared to enure to the uses in the articles. In 1815, the father and son revoked the uses, and resettled the estates; and possession had gone accordingly. The abstract stated, that the articles had been lost; and it appeared that search had been made for them. Held, that their non-production was not an objection to the title. Held, in the same case, if counsel for the purchaser waive the production of a particular document, stated in the abstract to be lost, and the purchaser adopt that opinion, and deal with the seller upon that view, he will not be permitted to repudiate the opinion of his counsel.¹

17. Upon the death of one of two partners, intestate, his personal representatives agreed to sell his moiety of the real property to the other, and furnish him at their own expense with an abstract of their title. Held, they were bound to furnish the usual abstract of title, and not merely the letters of administration.²

18. Purchase of a mansion-house and park under conditions of sale, which stated that the whole property was freehold, except eight acres which were copyhold, but undistinguished, except as not including any of the buildings. The abstract of title having been delivered, and discussions arisen thereon, which raised difficulties in the way of completing the purchase; a supplemental agreement was entered into, detailing among the requisitions, "declaration of identity of lands mentioned in deeds to those now sold." Held, on a bill filed by the vendor for specific performance, that the supplemental agreement was a substitution for the original contract, and that the vendee was not entitled to demand, that the vendor should distinguish the freehold from the

¹ *Alexander v. Crosby*, 1 Jones & Latouche, 666.

² *Morris v. Kearsley*, 2 You. & Coll. 139.

copyhold, so as to show that the latter did not include any of the buildings.¹

19. A condition of sale of copyhold estates stipulated, that the vendors should not be required to produce any deeds, instruments, or documents of title, not in their possession. Held, in an action to recover back the deposit, that the vendors were not bound to procure a covenant, for the production of two deeds not in possession of the vendor, but which were set out in the abstract of title delivered to the purchaser, and to which the vendors had procured access, for the purpose of verifying the abstract.²

¹ Dawson v. Brinckman, 3 Eng. Law & Eq. 239.

² Gabriel v. Smith, 6 Eng. Law & Eq. 172.

CHAPTER XVI.

TITLE TO LEASEHOLDS.

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| 1. Agreement for a lease. | 24. <i>Waiver</i> of title. |
| 5. Whether an agreement for a lease or purchase in fee. | 27. <i>Covenants</i> , in case of leasehold sales. |
| 10. What is necessary to constitute a sale of leasehold; offer and acceptance. | 31. <i>Part-failure</i> of title; compensation, rescinding, &c. |
| 11. <i>Uncertainty</i> in the agreement. | 46. Effect of <i>notice</i> upon the title. |
| 12. The vendor must make a good title. | 47. Parol evidence. |
| 22. Otherwise in case of express agreement to the contrary. | 50. Statute of Frauds. |

1. THE principles stated in the foregoing chapters, as to the *title* of a vendor, apply more particularly to sales *in fee-simple* or of *the entire estate*. There is another interest in real property, which often becomes the subject of sale and purchase, and which may most properly be considered in this connection, to wit, *leasehold estates or terms for years*. A *lease*, being an *executed conveyance*, and not a mere *executory contract*, does not fall within the plan of the present work, except so far as connected with the subsequent sale and purchase of the lessee's interest. But an *agreement to lease*, being in its nature *executory*, requires to be briefly noticed.

2. Whether an instrument is a lease, or only an agreement for one, depends upon the paramount intent of the parties, as collected from the whole tenor and effect of the instrument.¹ (a) Words of *present demise*, as *doth let, agrees*

¹ *Goodtitle v. Way*, 1 T. R. 735; *Perring v. Brooke*, 1 M. & R. 10; *John Hallett v. Wylie*, 3 Johns. 44, 383; *v. Jenkins*, 1 Cr. & M. 233.

(a) By St. 7 and 8 Vict. c. 76, § 4, any written agreement to let land

to let, agrees to pay for, &c., generally make an actual lease ; unless a contrary intent is to be gathered from the whole instrument. As where, notwithstanding such words, a future lease is provided for, upon the making of certain improvements ; or additional land is to be purchased, and included in the lease.¹ But an agreement to give a more formal lease may amount only to a covenant for *further assurance*.²

3. *Uncertainty* in the terms of holding generally constitutes the instrument a mere agreement to lease.³ So the fact that *a forfeiture* will be incurred, if otherwise construed.⁴

4. An agreement to give a lease may be enforced, either by an action for damages, or a bill in equity for specific performance.⁵

5. The question sometimes arises, upon the peculiar terms of a contract, whether it provides for *a lease* or *a purchase of the fee*. Thus, A. agreed with B. by deed, that he, A., would, on payment of £900, as thereafter mentioned, grant, sell, and convey to B. certain messuages, lands, &c. ; and B. covenanted to pay said sum on or before the 1st of January then next, or whenever a good title should be tendered to him ; but, if B. should, on or before the 1st of January, so desire that sum might remain a charge on the premises, it provided, upon completion by A. of the conveyances, B. should execute proper conveyances for securing £900 on the premises with interest. Covenant by B., to pay the interest, so long as the principal should remain unpaid. Proviso, that, if the interest should be in arrear thirty days, B. should be considered *as a tenant to A.* from the date thereof, at a certain yearly rent, payable semi-annually ; and

¹ Baxter v. Brown, 2 W. Bl. 973 ; Jackson v. Moncrief, 5 Wend. 26 ; Jackson v. Delacroix, 2, 433 ; Dunk v. Hunter, 5 B. & A. 322 ; Doe v. Ashburner, 5 T. R. 163.

² Jackson v. Keisselbrach, 10 Johns. 436.

³ Alderman v. Neate, 4 M. & W. 704.

⁴ Tenny v. Childs, 2 M. & S. 225.

⁵ Price v. Williams, 1 Mees. & W. 6.

shall be valid, and any one in possession under such agreement may, from payment of rent or other circumstances, be construed as a tenant from year to year.

it should be lawful for A., his heirs and assigns, to enter and distrain, and to sell and dispose of the distress, or otherwise to deal with the same, as in distresses for rent reserved by lease, to the end that A. might be fully paid and satisfied the interest and costs. B. gave due notice, that he would require the purchase-money to remain a charge for five years; was let into possession and received the rents, and in July, 1828, became bankrupt; and, half a year's interest being in arrear for more than thirty days, A. distrained on the tenants then in possession. The assignees paid the amount of the distress. On the 16th of October, 1828, after B. had obtained his certificate, another half-year's interest became due, and this action of covenant was brought against him to recover it. He pleaded the bankruptcy, generally. Held, the agreement was substantially an agreement for a purchase, and did not become a lease, or agreement for a lease, by non-payment of the interest, and the above proviso, that the plaintiff was entitled to have the estate resold, and the produce and interest applied in payment of the purchase-money, and to prove against the estate for the residue; and, consequently, that the claim for interest was a debt provable under the commission, and therefore barred by the certificate.¹

6. Declaration, that the plaintiff bargained to buy of the defendant, and the defendant agreed to sell to him, a dwelling house and fixtures, for the residue of a term then and still unexpired, to commence from the 1st of January, 1840, for £60; and the defendant promised to execute a proper conveyance, make out an abstract of title, and deliver possession from the 1st of January, 1840, &c. At the trial, the following paper, signed by the defendant, was read in evidence: "I agree to sell the house and fixtures, No. 163, Piccadilly, to commence from the 1st of January next, for £60." Held, this document imported the sale of a fee-simple, and did not sustain the contract alleged.²

¹ Hope v. Ellis, 1 Barn. & Ad. 498.

² Hughes v. Parker, 8 Mees. & W. 244.

7. Sometimes a lease itself contains a covenant to convey in fee-simple. In case of such a covenant, allowing a lessee to purchase the fee at a specified sum, the law intends that the rent was fixed at the amount reserved, as an inducement to such purchase.

8. The words, "shall have liberty to purchase," contained in a covenant, require a clear title, free from a claim of dower, and all other incumbrances; that is, *the whole title*.¹

9. A lessee for years, with an option at certain periods to purchase, and making that option, was considered owner *ab initio*, for the benefit of the heir; the price to be paid by the executor.²

10. The same *mutual understanding or assent* has been held necessary to a binding contract for the sale and purchase of a leasehold interest, as in contracts relating to an estate in fee. (See Ch. 2.) Thus, the defendant offered to purchase of the plaintiff the lease of a house, requiring possession *on the 25th of July*, and a definitive answer within six weeks. The plaintiff accepted the proposal, offering possession *on the 1st of August*. The defendant afterwards, and before the six weeks had expired, retracted his offer. Held, the plaintiff's acceptance of the defendant's offer not being in the terms proposed, and no proper acceptance of it having been given before the defendant withdrew, the agreement was vacated.³

11. It has been held, in reference to the sale of a leasehold interest, in conformity with the general rule on this subject, that equity will not decree specific execution of a contract, *uncertain in extent*; nor against a party *not competent to execute the contract*. Thus, a tenant for life, with power to make leases for twenty-one years, at the best improved rent, made a lease to B., and covenanted "for the term of his life to renew said lease to B., his executors, administrators, and assigns, by giving them a lease for twenty-one years when

¹ Jane Hunter, 1 Edw. 1.

² Daniels v. Davison, 16 Ves. 249.

³ Routledge v. Grant, 1 Moo. & P. 717.

applied to." B. surrendered the lease, under a clause empowering him so to do; and, afterwards, upon a new agreement, A. indorsed on the old lease "I promise and agree to perfect a fresh lease to B. at any time he shall demand the same at £5 a year less than the within-mentioned rent." It being uncertain whether the agreement was for more than one term of twenty one years, and an agreement for a further lease (even if clear) being in fraud of the power, a bill for a renewal of the lease for a second term of twenty-one years was dismissed.¹ So, a bill for specific performance of an agreement to renew a lease was dismissed, the agreement being too vague and uncertain to be executed by the Court.² So, the Court will not execute a contract for the sale of a *good will*, but will leave the parties to law.³ An agreement for a lease for seven, fourteen, or twenty-one years, gives the option to the lessee alone.⁴

12. As to the *title* or *assurance of title*, which the vendee of a leasehold may demand, it is held, that, if a contract be made for the sale of leasehold property unconditionally, and not merely the vendor's interest in the residue of the term, and a proviso that he will not warrant his lessor's title; (a) in order to enforce the contract, he is bound to show to the satisfaction of the purchaser, that his lessor, or the original grantor of the term, was entitled to grant the lease. (b) If

¹ Harnett v. Yielding, 2 Scho. & Lef. 549.

³ Baxter v. Conolly, 1 Jac. & Walk. 576.

² Price v. Assheton, 1 Y. & Col. 441.

⁴ Price v. Dyer, 17 Ves. 356.

(a) Whether the effect of advertising for sale a lease in possession is equivalent to a declaration that the lessor's title cannot be produced, *quære*. Deverell v. Bolton, 18 Ves. 505.

(b) And the implied obligation of the vendor may be confirmed, by an implication in the construction of the agreement itself. Thus, a declaration alleged, that it was agreed between the plaintiff and defendant, that the plaintiff should purchase two houses of the defendant for the residue of a term of years, &c; that the defendant should paper them, &c.; that the plaintiff should pay part of the purchase-money on completion of the conveyance of the houses, and the defendant make a good title. The agree-

the vendor of a leasehold interest means to sell, without producing his lessor's title, he ought to declare it. So, though the lease was originally granted by a lay corporation, (a) or is very old.¹ (b) So, a contract for the sale of an existing and a reversionary lease will not be specifically performed without a production of the title of the lessors.²

13. Memorandum of an agreement, dated the 15th of May, for sale and purchase of leasehold property, described therein as "a messuage held for the remainder of a term of years under the Corporation of Bath, and the late R. A., at the sum, &c.;" an abstract to be made out and delivered by the vendor, and the assignment to be made and prepared at the expense of the purchaser, the purchase-money to be paid at or before midsummer. The contents of two existing deeds were not introduced in the abstract, delivered on the 24th of May; though they were contained in an abstract delivered on the 3d of September. Held, on exception to

¹ *Sonter v. Drake*, 5 B. & Ad. 992; *Betty*, 4 Mann. & G. 410; *Ogilvie v. Purvis v. Rayer*, 9 Price, 488; *Hall v. Foljambe*, 13 Meri. 53.

² *Deverell v. Bolton*, 18 Ves. 505.

ment was as follows: "Mr. H. (the plaintiff) having agreed to purchase of Mr. B. (the defendant) two leasehold houses, &c., Mr. B. hereby agrees to paper, &c.; Mr. H. to pay, &c., at the time of the conveyance. &c." Nothing was said in the agreement as to making a title. Held, the agreement to purchase, though recited as an existing agreement, was to be considered as forming part of the agreement produced. *Hall v. Betty*, 4 Mann. & Gra. 410. So, a contract for a lease by a mortgagor cannot be enforced by him, without obtaining a reconveyance of the mortgage, or procuring the mortgagee to confirm the lease. But a tenant holding under such contract cannot compel the landlord to pay off the mortgage, to give effect to the contract. *Costigan v. Hastler*, 2 Scho. & Lef. 160.

(a) The rule has been held not to apply to a *Bishop's* lease. *Fane v. Spencer*, 2 Meri. 430.

(b) But it has been held, that, to make a good title to the residue of *an old term*, mesne assignments, which cannot be produced, will be presumed, even at law. But an old incumbrance must be attended to, unless it can be presumed that it does not exist. *White v. Foljambe*, 11 Ves. 337.

the report of the master, adverse to the title, that the purchaser might abandon his contract.¹

14. On a sale by auction of leasehold property, one of the conditions was, that the vendor "should not be obliged to produce the lessor's title." The vendee having *aliunde* discovered certain defects in the title, held, notwithstanding the condition, he was entitled to insist upon those defects.² So, a purchaser is not compellable to accept a title to leasehold premises, formerly subject to an incumbrance, the discharge of which is shown only by presumption. Thus, a leasehold was sold, subject to a ground-rent, which was said to be apportioned out of a larger rent, but the apportionment was not evidenced by any existing deed, but only by the acceptance of a mesne landlord, and presumption. Held, the purchaser was not bound to accept the title.³ So an assignee of a lease, to show his interest in the premises, is bound to prove the execution of the lease and all the mesne assignments.⁴

15. In an action against a purchaser of a leasehold at auction for not completing, the declaration averred, that the vendor had delivered an abstract of title, pursuant to the conditions of sale, which averment was traversed by the plea. Held, the allegation was not sustained, by proof that the vendor caused the lease and assignment, which composed the whole title, to be handed to the purchaser for perusal, and offered to send them to his attorney, to enable him to prepare the necessary assignment.⁵

16. Property was put up for sale by auction, described as "a leasehold ground-rent of £23 reserved by a mesne lease of certain premises for ninety-eight years wanting seven days, and assigned apart from the reversion for the remainder of the term by an indenture of 1817." By the conditions of sale, no title prior to the assignment, nor the title of any

¹ *Purvis v. Rayer*, 9 Price, 488.

² *Shepherd v. Kentley*, 1 Cro. Mees. & Rose, 117.

³ *Barnwall v. Harris*, 1 Taunt. 430.

⁴ *Crosby v. Percy*, 1 Camp. Ca. 303.

⁵ *Horne v. Wingfield*, 3 Scott's N. C. 340.

ground or mesne landlord was to be produced. From a recital in the deed of 1817, it appeared that the property out of which the rent issued had been originally demised, with other property, at a rent of £10, subject to the covenants, conditions, and agreements in the original demise contained. Held, that, under such circumstances, a good title was not made to the rent of £23, inasmuch as it appeared upon the face of the deed of 1817, that upon failure of payment of the £10 rent, the rent of £23 might be liable to diminution or forfeiture.¹

17. Bill by a vendor for specific performance of an agreement to take a lease for twenty-one years at rack-rent. The master reported in favor of the title shown by the abstract, but exception was taken to the report. Held, in the absence of an express agreement, such vendor is bound to produce the title of his lessor. The principle was laid down, that whether the interest contracted for be freehold or leasehold, for a long term of years, or a short lease at rack-rent, the party who comes for specific performance should be prepared to show, that he is able to give what he seeks to compel the other to take. It was questioned whether the rule applies, where the length of possession under the original lease has been sufficient to raise a presumption of title.²

18. Declaration in assumpsit, that the plaintiff put up leasehold premises at auction, subject to conditions that the purchaser should complete the purchase by a certain day, and the plaintiff deduce a good title, commencing with the lease under which they were then held. Breach, that although the plaintiff did deduce a good title, commencing with the lease, the defendant did not complete the purchase according to contract. Plea, that the premises were, on, &c., demised by T. L. to W. B. for a term still subsisting, subject to a covenant by W. B. to keep the premises in repair, and for reëntry by T. L. in default thereof; that the interest of

¹ Taylor v. Martindale, 1 Y. & Coll. 658.

² Fildes v. Hooker, 2 Mer. 424.

W. B. vested by assignment in the plaintiff, and that the plaintiff, after the assignment, suffered the premises to be out of repair, and they continued so up to the time of sale, so that the term might at the option of T. L. be determined; and that the plaintiff, by reason of the premises, had not, at the time of the sale or at any time afterwards, any good and valid title to the premises, and did not deduce or make a good title to the defendant. On special demurrer to these pleas, the former was held bad, as being an argumentative denial of the allegation in the declaration, that the plaintiff made a good title; and the latter, on the ground that, if the defendant meant to object to the validity of the lease, he ought to have confessed the allegation of title in the declaration as it stood, and then to have pointed the plea specifically to the objection that the lessor had not title.¹

19. Plaintiff put up to sale by auction a lease of premises, which he occupied as assignee of the lease, stipulating not to produce any title prior to the lease. In an action against a purchaser for not completing his purchase, the plaintiff declared that he was possessed of the lease. Held, the defendant having rejected the abstract, that the plaintiff was bound to prove the execution of the lease by the attesting witness, and that it was not sufficient to prove the assignment to himself.²

20. A. had purchased at auction an under-lessee's interest in a house, and refused to pay a check given for the deposit, because the ground-rent, payable to the superior landlord, was greater than it was stated to be at the sale. Held, the superior landlord's solicitor was not compellable to produce the counterpart of the original lease, nor could a person who had advanced money on that lease, and held it as equitable mortgagee, be compelled to produce the lease itself; but if both these, on being called as witnesses, refused to produce the lease and counterpart, secondary evidence might be given

¹ *Wheeler v. Wright*, 7 Mees. & W. 359.

² *Laythoarp v. Bryant*, 1 Bing. N. C. 421.

of the contents of the lease, by calling any person who had seen it, and who neither claimed under it as one of his own title deeds, nor was privileged as an attorney or solicitor.¹

21. The purchaser of a lease, though not so far a purchaser for valuable consideration, without notice, as not to be bound to know from whom the lessor derived his title; is not bound to take notice of all the circumstances under which it is derived. Therefore, he is charged with notice, that the lessors were trustees for a charity; but not that the lease was bad; that depending on circumstances *dehors*.²

22. But the general rule, as to requiring production of the lessor's title, does not apply where the terms of the advertisement, proposal, or agreement plainly negative such an obligation. (a) Thus, A. agreed to sell to B. the two leases and good will in trade of a public-house and shop adjoining for £4,250, "as he holds the same," for terms of twenty-eight years from midsummer next ensuing, at the annual rent therein mentioned; and B. agreed to accept a proper assignment of the said leases and premises as above described, without requiring the lessor's title; and, upon payment of said sum, A. agreed to execute an effectual assignment of the said leases, and deliver up possession of all the said premises. Held, the vendee was to purchase without inquiring into the title of the lessor, and could not refuse to complete his purchase on account of an objection to that title.³

23. So even the liability of the purchaser for the future

¹ Mills v. Oddy, 6 Car. & P. 728.

³ Spratt v. Jeffery, 10 Barn. & Cress.

² Attorney-General v. Backhouse, 17 Ves. 283.

(a) Even where the sale is a *general one*, the same doctrine has been sometimes held. Thus, in an action by the vendee against the vendor of a lease, for the deposit; it was held that the vendor is not bound to produce his lessor's title, without an express stipulation to that effect. *George v. Pritchard*, 1 Mood. & Ry. 417. So it has been suggested, that the owner of land, agreeing to grant a lease, does not thereby impliedly engage that he has a good title in fee, and will deliver a written abstract. *Temple v. Brown*, 6 Taunt. 60.

default of a third person, in consequence of the terms of the lease sold, has been held not to affect the validity of the sale. Thus, two houses held under one lease were sold separately to A. and B. The lease was produced and inspected at the sale by the purchasers' solicitors. The conditions of sale provided for the apportionment of the rent between the two purchasers, but did not notice covenants to insure, &c., and a proviso for reëntury on non-performance, contained in the lease. Held, though A. might be evicted by the default of B., still he was bound to complete.¹ So, on a sale in lots, of premises, the particulars of which state them to be held under one lease reserving rent, and that the purchaser of one lot is to be exclusively subject to the rent, the other purchasers cannot object to the title, on the ground of a clause of reëntury or non-payment, contained in the lease.²

24. While the production of title may be dispensed with by the special terms of the sale itself; it may also be impliedly *waived* by the purchaser. Such implication, however, must be clearly established, in order to prevail over the general rule of law. Thus, where a lessee in possession contracted to sell the residue of his term, being three years and a quarter, at the rent of £42 per annum, the vendee paying £30 for the fixtures, as per list; held, it was not to be inferred from the short residue of the term, the small value of the property, and the absence of any premium for the lease, that the vendee intended to waive his right to call for the production of the lessor's title.³ So the objection to the title is not waived, by a premature conditional approbation of it by the purchaser's counsel; but the expense of making out the title, before this objection was taken, shall be repaid.⁴

• 25. In a suit for specific performance of an agreement to accept a lease, the Court, considering the defendant, (the intended lessee,) by his conduct to have waived all objec-

¹ Paterson v. Long, 6 Beav. 590.

³ Senter v. Drake, 5 Barn. & Adol.

² Walter v. Maunde, 1 Jac. & Walk. 992.

⁴ Deverell v. Bolton, 18 Ves. 505.

tions to the vendor's title, decreed a specific performance, and referred it to the master to settle the lease. In settling the lease, it became necessary, for identifying the premises, to produce before the master the original lease, under which the plaintiff was entitled to the property, and from which lease it appeared, that the property in question was held with other property, at one entire rent, and under some special covenants, no provision with respect to which was made in the agreement between the plaintiff and the defendant. On the hearing, for further directions, these facts being brought before the Court by exceptions to the report; held, though the defendant had, by his conduct, waived his right to the production of the lessor's title, yet, as, in the course of the proceedings, it had become necessary to produce that title, and that production showed that a sufficient lease could not be made, according to agreement, the Court would not enforce a specific performance; and the bill was dismissed, but without costs.¹

26. Purchase of the benefit of an agreement for the lease of a public-house, and also of the stock and good will. The purchaser entered before the lease had been granted, paid part of the purchase-money, and mortgaged his interest. Held, that after this mode of dealing, he could not call for the lessor's title, or for evidence that the lease was made in conformity with the power under which it was granted.²

27. In reference to the title of leasehold property, questions often arise upon the necessity and effect of *covenants* for the protection and benefit of the lessee or purchaser. Thus, in addition to the rule above stated, as to the implied obligation in the sale of leasehold estates to give a good title to the purchaser, an agreement for a lease often stipulates for the insertion in such lease of *the usual covenants*.³ What covenants fall under this description, depends upon various

¹ Warren v. Richardson, You. 1.

² Haydon v. Bell, 1 Beav. 337.

³ See Sargent v. Adams, 3 Gray, 81.

circumstances, such as local custom, or the nature of the property; but it is always a question of fact for the jury. It has been held, that a lessee is not impliedly bound to covenant that he will not carry on a particular trade or business on the premises; nor assign nor underlet without license; nor that he will keep the premises insured, or pay the taxes. Nor is the lessor impliedly bound to covenant that he will rebuild in case of fire, and that the rent shall cease if he does not. But it seems he is bound to covenant for the lessee's quiet enjoyment, as against the lessor or those claiming under him.¹

28. Contract for an assignment of a lease of a public-house, which was described as holden at a certain *net rent*, upon *usual and common covenants*. The lease contained a covenant by the tenant, to pay land-tax, sewers-rate, and all other taxes, and a proviso for reëntry, if any business but that of a victualler should be carried on in the house. It was proved, that a considerable majority of public-house leases contained such a proviso. Held, the covenant was a common one in a lease reserving a net rent; and the proviso was also *usual and common*.²

29. So covenants *made for the benefit of the lessor* may come in question upon a sale of the lessee's interest. Thus, a lessee, subject to covenants, cannot compel specific performance of an agreement to purchase the premises, though he offer to indemnify the purchaser against the performance of the covenants.³ So if the vendor of a lease, in which is a covenant not to assign, contract to assign his interest, it is incumbent on him, and not on the purchaser, to procure the lessor's license for the assignment.⁴

30. A. agreed, in 1814, for a lease of building-ground for seventy-five years, at a ground-rent, containing the usual building covenants to insure, repair, allow lessor to enter and

¹ Church v. Brown, 15 Ves. 258; ² Bennett v. Womack, 7 Barn. & Cr. 627.
Bennett v. Womack, 7 B. & C. 627; Doe v. Sandham, 1 T. R. 705; Van v. Corp, 3 My. & K. 269. ³ Fildes v. Hooker, 3 Madd. 193.
⁴ Lloyd v. Crispe, 5 Taunt. 249.

view repairs, &c.; and that in case of non-payment of rent, or breach of any covenant, the lessor was to have the right to reënter. The lease was never executed, but the tenant entered, and built, at considerable expense, and continued in possession up to his decease in 1843. Up to that time the rent was paid regularly, but the covenants to repair and insure were neglected. Upon the decease of the lessee, disputes arose in the ecclesiastical court as to the right to representation to his estate, and probate was not granted until 1847. During these four years the rent was in arrear, and the covenants to insure and repair were totally neglected. The lessor threatened to bring ejectment. Held, on a bill brought to restrain the ejectment, and to have a specific performance of the agreement, inasmuch as the lessor, if the lease had been formally executed in 1814, would now have had a right to determine it by breach of covenant, the Court would not decree specific performance; and that the disputes in the ecclesiastical courts did not afford sufficient ground for relief.¹

31. It has already been considered, (Ch. 13,) how far non-compliance *in part* with the terms and conditions of sale furnishes ground for avoiding the contract or demanding proportional compensation. Most of the cases on this subject relate to the transfer of estates in fee simple. But substantially the same principles have been applied to the sale of leasehold interests.

32. It has been held that a lease, deliberately executed, cannot be set aside, on account of an unfounded, though justifiable assertion of the lessor pending the treaty, there being no wilful misrepresentation; nor on the ground of mistake, from an omission of a general warranty; such warranty not constituting part of the agreement.²

33. A. having agreed to purchase of B. the remainder of a term, B. delivered him the lease, in order that he might pro-

¹ Gregory v. Wilson, 10 Eng. Law & Eq. 133.

² Legge v. Croker, 1 Ball. & Beat. 506.

cure an assignment. A. then obtained an enlargement of the term from the original landlord, and refused to accept an assignment or pay the full price, because B.'s under-tenant had removed fixtures. Held, no sufficient objection to accepting the assignment.¹

34. A particular, describing a lease, as subject to notice to quit, is not inconsistent with a covenant, that the tenant shall hold over for a certain time "after the end of the term;" that being upon the context distinguished from the "other sooner determination;" and time, generally, not being of the essence of the contract.²

35. The principle of *compensation* (see Ch. 13,) has been applied to the sale of leasehold estates, where the contract is but partially completed. Thus, the defendant contracted to sell an inn to the plaintiff, and in the treaty represented to him, that the agreement, under which the tenant in possession held it, was void, and that he would give the plaintiff possession at Michaelmas following. He had given the tenant notice to quit at that time; but the tenant did not quit. Held, the plaintiff might be released from the agreement, or at his election perform it, and have compensation with costs.³

36. Bill for general relief. The plaintiffs entered into an agreement with the defendants for a lease of thirty-one years, but could obtain from them a legal lease for only twenty-one years, and a covenant for a further term of ten years. Although the bill was framed with a view to a different relief, yet, inasmuch as upon the whole statement of the bill such appeared to be the equity between the parties, and in order to avoid future litigation, the Court decreed that the plaintiffs should accept the lease and covenants, with compensation.⁴ So the particular of a church lease represented it as for twenty-one years, with covenants for renewals to sixty-three years; the lease being actually for lives; and the cove-

¹ Parry v. Frame, 2 Bos. & Pull. 451.

² Hall v. Smith, 14 Vcs. 426.

³ Besant v. Richards, Tamlyn, 509.

⁴ Hanbury v. Litchfield, 2 Myl. & Kee. 629.

nants limited and contingent. Specific performance was decreed, upon the bill of the purchaser, with compensation, if to be ascertained, by reduction of the purchase-money; if not, or if the plaintiff would so take it, with an indemnity; the defendant proposing an option to take it as it was, or relinquish the contract.¹

37. But where a bill for specific performance of an agreement for a lease, signed by the grantor only, and contrary to his leasing power, of which the plaintiff had notice, was afterwards amended; and prayed an execution of the agreement for the life of the grantor, without requiring compensation for the difference of interest; held, the bill should be dismissed, the case proved for the plaintiff creating doubts and suspicions of the fairness of the transaction.²

38. So compensation will not be decreed, if the purchaser would thereby lose the substantial benefits of the contract. Thus, an indefinite representation by the vendor, that a leasehold estate was nearly equal to freehold, being renewable upon a small fine, under certain circumstances, may be fraudulent, and furnish ground for rescinding the contract.³ So where leasehold premises are sold by auction, and the lease containing the usual covenant to repair is produced and read to the bidders, if any of the buildings demised and described in the lease, though not in the particulars, have been pulled down, the purchaser is not bound to complete the purchase, and may recover back his deposit.⁴

39. On a sale of a leasehold interest of lands, described in the particulars as held for a term of twenty-three years at a rent of £55, and as comprising a yard, one of the conditions was, that, if any mistake should be made in the description of the property, or any other error whatever should appear in the particulars of the estate, it should not annul or vitiate the sale, but a compensation should be made, to be settled

¹ *Milligan v. Cooke*, 16 Ves. 1.

² *O'Rourke v. Percival*, 2 Ball. & Bea.
56.

³ *Fenton v. Brown*, 14 Ves. 143.

⁴ *Grainger v. Worms*, 4 Campb. 83.

by arbitration. The yard was not, in fact, comprehended in the property sold for the term at £55, but was held by the vendor from year to year, at an additional rent; and it was essential to the enjoyment of the property leased for the twenty-three years. It did not appear that the vendor knew of the defect. Held, this defect avoided the sale, and was not a mistake to be compensated for under the above condition; although, after the day named in the conditions for completing the purchase, and before action brought by the vendee, the vendor procured a lease of the yard for the term to the vendee, and offered it to him.¹

40. The conditions of sale of the lease of a public-house described it as "a free public-house." The lease contained a covenant, that the lessee and his assigns should take their beer from a particular brewer; this lease was all read over by the auctioneer at the sale, and he said by mistake, that it was a *free public-house*, and that this covenant had been decided to be bad. Held, a purchaser, who heard the lease read over, was not bound to complete the purchase, but was entitled to recover back the deposit.²

41. A lessee of lands, subject to a covenant against certain obnoxious trades, with a proviso for reëntry, grants under-leases of houses erected on the land, not containing a similar covenant and proviso. Held, that a purchaser by auction of houses on the land, and of the improved ground rents of the houses so underlet, might recover back his deposit-money, this omission in the under-leases not having been mentioned in the conditions of sale.³

42. Certain leasehold houses were sold by auction, described in the particulars and conditions of sale, as a well secured rental with reversionary interest, and an eligible investment, but without warranty of title. By a local act, for the establishment of the *South London Market Company*, the company

¹ Dobell v. Hutchinson, 3 Adol. & Ell. 335. ³ Waring v. Hoggart, 1 Ry. & Mood. 39.

² Jones v. Edney, 3 Campb. 285.

were authorized to treat for, purchase, and take the premises for the purposes of the act. No notice was given of this liability in the particulars and conditions; and the vendee had no notice of it. The conditions contained no express warranty of title. Held, this sale did not involve a warranty of a clear title, free from all charges, incumbrances, and liabilities; but the purchaser was entitled to rescind the contract.¹

43. Sale by auction, of a lot described in the particulars, as "eleven houses, No. 1, 2, 3, &c., situate, &c., held by lease of A." Previous to the lease, a small part of the ground of No. 2 was subtracted from the possession of the lessee; but the lease contained a description and plan, in the margin, of the whole ground plot, including this part. Held, although in equity A. should not be entitled to enforce the covenants in the lease as to that part of the ground, yet, the particulars referring to the lease, without an exception of this plot, the purchaser was entitled to demand a title to the whole estate contained in the lease, and an assignment of the lease was not sufficient.²

44. A lessor covenanted, that, if the lessee should erect a two-story dwelling-house, corresponding in elevation with a house already built on a part of the premises, the lessor, at the termination of the lease, would pay for the building, at a valuation to be made by appraisers, to be appointed by the parties. The tenant erected a building which did not correspond in height with the dwelling referred to, and was finished for a cabinet-maker's shop, but was capable of being converted into a dwelling-house in a few days' time, at a moderate expense. The lessor had early knowledge of the character of the building, and made no objection, nor did he give any intimation that he should refuse to pay for it, until just before the lease expired, when it was too late to make the building conform to the requirement of the lease. Before the lease expired, he concurred in the appointment of

¹ Ballard v. Way, 1 Mees. & Wels. 520.

² Tomkins v. White, 3 Smith, 435.

appraisers, who met and examined the premises in presence of the parties. Three days before the lease expired, the lessor informed the appraisers, that the building was not according to contract, and insisted that the lessee had no claim for compensation. No award was made by the appraisers. On a bill filed by the lessee for relief, and to compel payment of the value of the building; held, not a case of fraud; that the lessor might set up the defence, that the building did not conform to the contract; and that the bill could not be sustained.¹

45. The plaintiff, in the *first* and *third* counts of his declaration, alleged, that, at the time of making the agreement with the defendant, he was possessed of a house, for a certain term of years, *to expire on the 25th December, 1856*; and, in the *second*, that he was entitled to the term, *under and by virtue of a certain contract*. The proof was, that the plaintiff was possessed of a term of *twelve* years only; and there was *no* contract or agreement under which he was at that time entitled to an extension of the term. Held, that this was a fatal variance, although it appeared that the plaintiff had since become possessed of a lease *to expire in December, 1856*.²

46. In the sale and purchase of leaseholds, as in other cases, the legal rights of the parties may be varied by *notice*. (*a*) Thus the purchaser of a leasehold is held to contract, with

¹ Pike v. Butler, 4 Comst. 360.

² Routledge v. Grant, 1 Mood. & P. 717.

(*a*) While the purchaser of a leasehold may incur certain liabilities and obligations by notice, a lessee may by the same means acquire certain rights as against a purchaser from the landlord. Thus, where a tenant for life granted leases for lives under a power, and bound himself, upon the dropping of a life, to grant a new lease, with the same provision for renewal, on the death of any person to be named in any future lease; and afterwards joined in a sale; though the power is exceeded, yet, if a life drops in the life of the lessor, the purchaser, having notice, must specifically perform by granting a new lease with the same provision.

General notice to a purchaser, that there are leases, is notice of all their contents. So a purchaser, being told that a part of the estate was in pos-

notice of the clauses of the lease.¹ And a purchaser of the right and interest of another, under a contract for a lease, with full notice of the nature of it, cannot object to payment of the consideration, either on the ground that such contract is not binding on the vendor, or for want of title.² So the mortgagee of a lease, which recited the surrender of a former lease, which was in consideration of the surrender of a former lease, in which the plaintiff's title appeared; was held to have notice of the title.³

47. But, a landlord having given notice to his lessee, (under a covenant in the lease,) that he would reënter, if the premises were not put into repair within three months; if an auctioneer sell the lease, without communicating such notice, the vendee may recover his deposit, although he knew the dilapidated state of the premises at the time of sale.⁴

48. Questions have sometimes arisen, as to the introduction of *parol evidence* to explain or vary written agreements relating to leaseholds. In general, such evidence is not admissible for this purpose. Thus, to prove a rent beyond that expressed in the agreement.⁵ Nor, (in support of a bill for specific performance,) to prove, from conversations before and at the time of signing such agreement, that the premises were to be "clear of all taxes," the memorandum being

¹ *Walter v. Maunde*, 1 Jac. & W. 181;
² *Taylor v. Stibbert*, 2 Ves. 437.

³ *Baxter v. Conolly*, 1 Jac. & W.
 576.

⁴ *Coppin v. Fernyhough*, 2 Bro. C. C.
 291.

⁵ *Stevens v. Adamson*, 2 Stark. 422.
⁶ *Preston v. Merceau*, 2 Black. 1250.

session of a tenant, was held bound by the lease. *Taylor v. Stibbert*, 2 Ves. 437.

C., being about to marry, applied to A., his landlord, and requested him to change a *cestui que vie* in his lease, by inserting, in the place of an old life, the name of his intended wife, which A. by letter promised to do. Upon the faith of such promise the marriage was had, and the demised premises settled upon the wife. Upon a bill by the wife, (C. being dead,) it was held, that she would have been entitled to specific execution against A.; and, the estate of A. having been sold to O., who was deemed under the circumstances to have had notice of the agreement, he was decreed specifically to perform it. *Crofton v. Ormsby*, 2 Scho. & Lef. 583.

written by the lessee, and these words omitted.¹ But specific performance was decreed, (after a trial at law,) of a parol undertaking by the assignee of a lease, to indemnify the original lessee, (the vendor,) against the rent and covenants; a presumption arising from the nature of the transaction, and the assignment being "subject to the rents and covenants on the part of the lessee;" although the conditions of the auction sale expressed no such engagement.²

49. A purchaser, who in his written contract stipulates for a good title, cannot be required to complete the purchase upon a defective title, on the ground of a verbal waiver of such stipulation.³

50. In *assumpsit*, the first count recited an agreement, that plaintiff should grant, and defendant take, a lease of lands; and that all straw, &c., on the lands when possession was given up, should be valued by persons named respectively by the parties, and the amount paid; that, on the execution of the lease, defendant should accept it, and execute a counterpart; and that either party making default should forfeit £300; that there were mutual promises to perform the agreement; that defendant entered, and took possession of the straw, &c.; that he afterwards proposed that the straw, &c., should be valued to the plaintiff by a third person, and the plaintiff assented that it was so valued; that the plaintiff was ready to grant the lease, but the defendant did not pay the amount of the valuation.

Second count, for goods bargained and sold, and taken by the defendant under such bargain and sale.

Plea to the first count, that the first agreement was in writing, signed by plaintiff and defendant, and the proposal and assent for the valuation only verbal. To the second count, that the goods consisted of straw, &c., which were bargained and sold under a written agreement, by which they were to be valued by persons chosen respectively by

¹ *Rich v. Jackson*, 4 Bro. C. C. 518.

² *Pember v. Mathers*, 1 Bro. C. C. 52.

³ *Goss v. Lord Nugent*, 2 Nev. & Man. 35.

plaintiff and defendant; and that no such valuation had been made, but only a valuation (as above); that defendant was ready, and had proposed, that they should be valued as in the agreement; but plaintiff refused.

Replication, 1. to the plea to the first count, that by the proposal, assent, and valuation, the parties respectively waived so much of the agreement as related to the valuation, and substituted the other valuation; 2. to the plea to the second count, that the straw, &c., was bargained and sold under the agreement in the first count mentioned; that afterwards defendant proposed, &c., (as in first count,) and plaintiff assented, and it was valued accordingly; by means of which plaintiff and defendant waived, &c., (as in the replication to the plea to the first count.)

Rejoinder to replication 1, that the waiver and substitution were by word of mouth only. To replication 2, that the proposal and assent were by word of mouth only.

On general demurrer to the rejoinder; held, that the original was an entire agreement relating to an interest in lands, and necessarily in writing; that, even if the parties could waive the whole verbally, they had not done so; and that a part could not be verbally waived, even though in itself not required to be in writing.¹

51. The application of the *Statute of Frauds* to the sale and purchase of leasehold interests has often been brought in question.

52. An agreement, by one having a term for years, to give up possession to another, and allow him to become tenant for the residue of the term, in consideration of his paying in part for certain repairs, is within the statute.²

53. So an agreement by a termor to quit on a certain day, and pay all outgoings up to that time, in consideration of a sum to be paid him by one who has agreed with the landlord for a lease at the end of the subsisting one.³ So the statute is a good defence to a parol variation of an

¹ *Harvey v. Graham*, 5 Adol. & Ell. 61.

² *Buttmer v. Hayes*, 3 Jur. 704.

³ *Smith v. Tombs*, 3 Jur. 72.

agreement for a lease. But not if it only amounts to a waiver in part, or to a declaration of trust.¹ A parol agreement made in the course of proceeding before an arbitrator, that he shall determine as to a lease to be granted, is within the statute, and an award for a lease cannot be enforced.²

54. Upon the point, what constitutes a sufficient signing or memorandum, it has been held that the bare entry of a steward, in his lord's contract-book with his tenants, is not evidence of itself of an agreement for a lease between the lord and a tenant.³ But where A. agrees by parol with B. for a lease, which is drawn, and then perused and corrected by A.'s counsel, and afterwards engrossed and executed by B.; it has been doubted whether this is within the statute as to A.⁴ And if a party has entered into a parol agreement for a lease, and a draft of it is prepared, though the agreement is void under the statute, yet he will be bound by an indorsement on the draft referring to the case.⁵

55. The question has been raised, whether a signing *by an agent* is a sufficient compliance with the statute.

56. A. was tenant for life, with power to lease by deed, reserving the best yearly rent. The plaintiff entered into possession, and expends money in building under an agreement for a lease, proved only by the memorandum in writing, entered in the book of A.'s authorized agent, and signed by the agent's clerk, although shown to have been approved by the agent, and according to the usual course of business. A. died, and a bill was brought for specific performance against the remainder-man. Held, first, no sufficient agreement in writing, not being signed by an agent properly authorized, and, if it had been, the memorandum not containing some of the material terms of a lease, which were left to be made out by parol evidence; secondly, not to be established as a parol agreement in part performed, both as it was not the agreement of the principal, nor of the authorized agent, and

¹ *Jordan v. Sawkins*, 3 Bro. C. C. 388; 1 Ves. 402.

² *Walters v. Morgan*, 2 Cox, 369.

³ *Charlewood v. Duke of Bedford*, 1 Atk. 497.

⁴ *Lowther v. Carril*, 1 Vern. 221.

⁵ *Shippey v. Derrison*, 5 Esp. Ca. 190.

also because the remainder-man had been guilty of no fraud, upon which to charge him with the conveyances of the contract. Also, that the plaintiff was not entitled to compensation from A.'s representatives, for money laid out by him on the faith of the alleged agreement; such compensation being in the nature of damages, and the fault lying in the plaintiff's own negligence.¹

57. Bill to recover a balance of purchase-money against two defendants. Hendon, one of the defendants, contracted in writing with the plaintiff for the purchase of a college lease; and the plaintiff agreed to renew the lease in the name of Hendon, or such person as he should nominate and appoint. Hendon directed the plaintiff to renew the lease in the name of Cox, the other defendant, and declared he bought it for him as his agent. The plaintiff brings the bill against both for the residue of the purchase-money. The decree at the rolls was against both defendants, to pay the money, and, in case Hendon should pay it, that he might prosecute the decree, in the name of the plaintiff, against Cox. Cox appeals, for that he did not give any authority in writing to Hendon to buy the lease for him as required by the Statute of Frauds. Decree affirmed.²

58. With regard to the effect of *part-performance* upon the validity of a parol agreement; specific execution of a parol agreement for a lease for three lives, proved by one witness, was refused; the answer admitting an agreement for one life only, supported by the testimony of one witness, and not inconsistent with the evidence of part-performance given by the plaintiff.³ So, in case of a bill for the execution of a parol agreement for a lease of a house to the plaintiff, who, in confidence of the agreement, had laid out money; a plea of the Statute of Frauds was allowed.⁴ But, in case of a bill for specific performance of a parol agreement for a lease, charging possession taken and other acts of

¹ Blore v. Sutton, 3 Mer. 237.

² Waller v. Hendon, 5 Vin. Abr.

³ Lindsay v. Lynch, 2 Sch. & Lef. 1.

⁴ Hollis v. Whiteing, 1 Vern. 151.

part-performance; a plea of the statute, and answer, not denying the acts alleged, but stating that the defendant, being advised that he entered as tenant at will, gave notice to quit; was overruled.¹ So, in case of an agreement for a lease, in part performed by possession taken, though without express assent, acquiesced in, and expenditure permitted; specific performance was decreed according to the plaintiff's evidence, against the assertion of a right of resumption by the answer, and one witness, not proving that it was admitted.² So, an agreement in writing for a lease, not signed by the defendant, was specifically executed, on the ground of part-performance, viz: possession taken and rent paid according to the agreement.³ So, specific performance of a parol agreement to grant a lease was decreed on the testimony of one witness, confirmed by circumstances, against the denial in the answer, after part-performance by delivery of possession.⁴ So, in case of a bill for specific performance of a parol agreement to renew, the plaintiff having built a house; the only witness for the plaintiff proved an agreement different from that in the bill; and two defendants by answer stated an agreement different from both. Held, in strictness, the bill ought to be dismissed; but specific performance was decreed according to the answers, with costs against the plaintiff.⁵ So, in case of a bill for specific performance of a parol agreement to let lands; the defendant had suffered his wife to receive money from the plaintiffs, in consideration of fines, (he being incapable of receiving fines,) and had written a letter to a third person, acknowledging the demise, and stating that he was ready to make leases. These circumstances were held sufficient to take the case out of the Statute of Frauds.⁶ So a decree was made for specific performance of an agreement to grant a lease, of which only one part, signed by the plaintiff, was found in

¹ *Bowers v. Cator*, 4 Ves. 91.

² *Gregory v. Mighell*, 18 Ves. 328.

³ *Kine v. Balfe*, 2 Ball & Beat. 343.

⁴ *Morphett v. Jones*, 1 Swanst. 172.

⁵ *Mortimer v. Orchard*, 2 Ves. 243.

⁶ *Hartly v. Wilkinson*, Irish Term Rep. 357.

the possession of the defendant, upon the grounds of possession, drafts prepared and approved, and the execution deferred only till repairs were completed. But an extension of the term, according to a variation of the agreement, also in writing, was refused, on the ground of want of consideration.¹

59. Bill by the tenant of a farm, for specific performance of a parol agreement for a new lease, stating improvements made at a considerable expense, continuance of possession after the expiration of the old lease, and payment of an increased rent under the agreement. Plea of the Statute of Frauds ordered to stand for an answer, with liberty to except.²

60. Bill for specific performance of a parol agreement to grant a lease for twenty years, alleging acts in part performance. Plea of the Statute of Frauds; and answer, denying that the acts were done in part-performance. The plea was saved to the hearing, with liberty to except; the Lord Chancellor inclining to the opinion that, though the agreement is admitted, the statute may be used as a defence to the suit.³

¹ Robson v. Collins, 7 Ves. 133.

² Wills v. Stradling, 3 Ves. 378.

³ Moore v. Edwards, 4 Ves. 23.

CHAPTER XVII.

RESCINDING OF SALES.

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|---|---|
| 1. General subject ; grounds for abandoning a contract. | 18. <i>Waiver</i> . |
| 10. <i>Misdescription</i> of the property. | 20. <i>Mode</i> of rescinding ; by vendor or vendee ; form of action. |
| 13. <i>Compensation</i> . | 28. Interest, improvements, &c. |
| 16. <i>Presumption</i> of rescission. | |

1. IN the foregoing chapters, relating to the subject of *title*, it has been incidentally considered, for what defects of title or other variances from the terms of the contract, the vendee may refuse to complete the sale. In the natural order of topics, we proceed to treat of the *rescinding* of a sale of real property, generally. This will involve the extensive subjects of fraud, mistake, personal incapacity, and other legal or equitable grounds for avoiding the contract. In the present chapter, we propose to consider more particularly those causes, which are independent of any deceit or misrepresentation, and pertain rather to the condition of the property sold. Reference will also be made to rescission by *the vendor* as well as the vendee.

2. It may be remarked, that, if a party to the sale has himself abandoned the contract, he cannot avail himself of it in opposition to a legal claim, against which, until abandoned, it would have been a good defence. Thus, the defendant, being entitled to an undivided moiety of a piece of ground, agreed with the plaintiff, that, in case either of them should purchase the other moiety, the whole should be divided in a particular manner between them. This moiety was sold to a third party, whereupon the plaintiff and defendant further agreed, that neither of them would purchase

it until they had agreed upon a sum to be given for it, subject to the former agreement. The defendant afterwards refused to agree upon the price, and, the plaintiff having purchased the moiety, the defendant refused to carry the agreement into effect. Held, in a suit for partition, the defendant was bound to fix a price; also, that he had abandoned the contract, and could not set it up as a bar.¹

3. One party to a contract cannot abandon it as against the other, although the former had no legal power to make the contract, and although the collateral circumstances, with reference to which the contract was made, have ceased to exist. Thus, a railway company had a bill before parliament for making a railway from W. to S., with a line diverging to N. One of the objections to the bill was, that the diverging line would cross another railway line. When the bill was in committee, it was ascertained that this objection would be removed, if the company were to obtain an estate settled on A. for life, with remainders over, which, however, by their bill they would not be authorized to buy. An agreement was entered into between the company and A. to purchase this estate from A., and to perform all such acts as might enable A. to sell it. The bill was passed, without obtaining any powers to purchase A.'s estate, and omitting the diverging line. The line from W. to S., and every thing connected with it, were afterwards abandoned by the company. In a suit by A. against the company, for specific performance; held, they were bound to perform.²

4. Nor can a vendor rescind the sale, upon the ground that the plaintiff (the vendee) has wrongfully taken other property, instead of the property sold.

5. Action for not permitting the plaintiff to carry away from the land of the defendant, according to the conditions of sale, certain trees purchased by the plaintiff. Defence, that before breach the plaintiff fraudulently felled and carried

¹ *Morris v. Timmins*, 1 Beav. 411.

² *Hawkes v. Eastern, &c.* 4 Eng. Law & Eq. 91.

away from the defendant's lands other trees, not sold to him, as and for, and which were fraudulently pretended and represented by the plaintiff to be, the trees which were sold, and which were equal to them in value and number. Held, an insufficient defence, showing neither a rescission nor an estoppel.¹

6. In an action for money had and received, to recover a deposit for a defect of title, the plaintiff must prove the title *bad*, not merely that it has been deemed insufficient by conveyancers employed to advise upon it.²

7. A failure by the obligor, in a bond for title, to perform the condition, is no ground for cancelling the contract in equity.³

8. Contract to sell and convey, upon payment of the purchase money, as the respective instalments became due, and, in case of failure to pay any instalment when due, reserving the power to ratify or revoke the contract at pleasure. The vendee entered upon and improved the land, and paid part of the purchase-money, but failed to pay the balance at the time stipulated, and the seller rescinded the contract, and conveyed the land to another. The vendee files a bill in equity to recover the consideration-money, and compensation for the improvements, without alleging fraud or insolvency in the vendor, and without asking other relief. Held, not a case within the jurisdiction of equity.⁴

9. The conditions of sale represented that a deed, under which A. claimed an interest in the estate, was a forgery, that the vendor had made his affidavit to that effect, and, therefore, that the purchaser should not take any objection to the title by reason of that deed. The purchaser afterwards refused to complete the purchase, brought an action for his deposit, and obtained a verdict, the jury declaring the deed to be genuine. Held, in a bill by the vendor for specific performance, that at law the purchaser could not rescind on

¹ Lewis v. Clifton, 25 Eng. Law & Eq. 380.

² Camfield v. Gilbert, 4 Esp. Ca. 221.

³ Shoup v. Cook, 1 Smith, 29.

⁴ Notson v. Barrett, 1 Iowa, 302.

the ground that the affidavit turned out to be untrue, and, in equity, that the vendor, in case he could make a good title in other respects, was entitled to a decree for specific performance, with costs.¹

10. With regard to *misdescription* of the land sold, as ground for rescinding the sale, it has been held, that a purchaser under a particular, giving a false description, is not bound at law or in equity, nor by any act of his agent, without a fresh authority or subsequent approbation; a different agreement requiring a fresh authority.² So, where conditions of sale are so obscurely worded, that, when taken in connection with the particular they are likely to mislead an ordinary purchaser as to the nature of the property offered, it seems the Court will discharge the purchaser in the argument of exceptions to the title, without a motion to be discharged.³ So, an injunction to stay proceedings, in an action brought by a purchaser to recover the amount of his deposit, was refused; the description in the printed particular of sale being calculated grossly to deceive as to the real nature and value of the estate sold.⁴ So, it is held, that specific execution will not be enforced, unless the parties have described and identified the tract, or unless the contract furnish the means of certainly identifying it.⁵ Thus, by the conditions of sale, no further evidence of identity was to be required, than what was afforded by the abstract, and the documents therein abstracted. The descriptions in the documents differed amongst themselves, and from the descriptions in the particulars of sale. Held, that the purchaser was entitled to have further proof of the identity.⁶ So, misdescription of the quantity of land, in regard to the acres being *statute* acres or *customary*, is not matter of compensation, but a ground for setting aside the sale.⁷

¹ Cattell v. Corral, 3 Y. & Coll. 413.

² Deverell v. Bolton, 18 Ves. 505.

³ Taylor v. Martindale, 1 Y. & Coll. 658.

⁴ Stewart v. Alliston, 1 Mer. 26.

⁵ Reed's Heirs v. Hornback, 4 J. J. Marsh. 375.

⁶ Flower v. Hartopp, 6 Beav. 476.

⁷ Price v. North, 2 Y. & Coll. 620.

11. On the other hand, it has been held, that agreements for sale of an estate, especially if by auction, depend on the *bona fides* of the transaction; therefore trifling errors in the description are not material. Thus, the advertisement of an estate described it all as freehold, though a small part was held at will.* After execution of articles, a treaty for an exchange of that part took place; pending which, at the time appointed for completing the purchase, the purchaser took possession forcibly, but proceeded in the treaty afterwards, till he finally refused to agree to the purchase. On a bill of the vendor, the purchase-money was decreed to be paid, with four per cent. from the time appointed; but an inquiry was directed, as to what ought to have been the compensation at that time for the part not freehold; that, with the out-going, to be deducted.¹ So an injunction was granted, to stay action against an auctioneer for the deposit, although the estate was represented as freehold, with leasehold adjoining, and turned out to be almost all leasehold, and although there had been great delay in making out the plaintiff's title.² So specific performance of an agreement for the sale of an estate was decreed, notwithstanding a variance from the description, with compensation for the deficiency in value; though a minute examination might have discovered the defects; as in the state of the house and the cultivation of the lands; but not for a variance from the description as lying within a *ring-fence*, this being an object of sense, and upon the evidence the purchaser being apprised of it.³ So specific performance was decreed against a purchaser at auction, where the representation in the particulars was so vague and indefinite, that it ought to have put the purchaser on inquiry.⁴ So a purchaser is not entitled even to an abatement, for a deficiency in quantity; the particular describing the estate, as containing by estimation forty-one acres, be the same more or less.⁵ So, where lands

¹ Calcraft v. Roebuck, 1 Ves. 221.

² Fordyce v. Ford, 4 Bro. C. C. 494.

³ Dyer v. Hargrave, 10 Ves. 506.

⁴ Trower v. Newcome, 3 Meri. 704.

⁵ Winch v. Winchester, 1 Ves. & Beam. 375.

had been purchased under a decree in a creditor's suit, the Court, on the application of a creditor, who had for four years acquiesced in the purchase, and who was not supported in his objections by the other creditors, refused to set aside the purchase on the ground of misdescription of the land in the particulars.¹ So it has been held, that the generality and vagueness of descriptions of copyhold property on the court rolls are so well known, that a vendor is not bound to show how such description is to be applied to the present state of the property, if he prove that the property has actually been enjoyed and passed under that description for upwards of sixty years.²

12. And even where a judgment has been recovered at law by the vendee, upon the ground of misdescription in the deed, as compared with the contract; equity will sometimes interfere for relief. Thus a bill was brought to be relieved against a verdict and judgment in ejectment for a farm, which the purchaser of the manor would have to be comprehended under general words in the deed, but which were never mentioned in the particular given before the purchase was made, but enjoyed by the vendor several years after the sale of the manor. The plaintiff was relieved.³

13. We have already considered (chapters 13, 16,) the right of a purchaser to receive *compensation* in equity, for any deficiency in the land sold. It may be added, in the present connection, that no compensation will be allowed in a case of great intentional misrepresentation, although so provided by the conditions of sale, in case of "any error or misstatement" in the particulars.⁴ So, in the analogous case, where a party obtains an agreement by a partial misrepresentation, he is not entitled to a specific performance, on waiving the part affected by the misrepresentation; the effect of such misrepresentation being, not to alter or modify the agreement, but to destroy it entirely, and to operate as a personal bar to the

¹ Price v. North, 2 Y. & Coll. 220.

² Long v. Collier, 4 Russ. 267.

³ Tyler v. Beversham, Rep. Temp. Finch, 80.

⁴ Stewart v. Alliston, 1 Mer. 26.

party who has practised it.¹ So a condition in articles of sale, "that any error in the particulars shall not vitiate the sale, but a compensation shall be made," only applies to cases, where the circumstances afford a principle by which this compensation can be estimated. Therefore, on the sale of a reversion, expectant on the death of A. B. *without children*, an error in the statement of A. B.'s age does not come within the condition, (as it would, if the reversion were simply expectant on A. B.'s death,) because it affects the probability of the other contingency, which is not a subject of calculation. Hence the purchaser is entitled to rescind.² So a condition, "that if any mistake shall be made in the description, or any other error in the particulars of the property, such mistake or error shall not annul the sale, but a compensation shall be given, &c.," does not apply, where any substantial part of the property turns out to have no existence, or cannot be found; or where the vendor has *malâ fide* given a very exaggerated description of the property. The purchaser may in such a case rescind the contract *in toto*.³

14. The particulars of a sale at auction described two houses as Nos. 3 and 4, and stated, that the taxes of No. 3 were paid by the tenant. The houses were really Nos. 2 and 3, though the names of the occupiers were correct; and the taxes of No. 3 were farmed by the landlord. The houses Nos. 2 and 4 were of the same rate; but No. 4 was in the best state of repair. Held, these misdescriptions were not cured by a condition, that, if any error or misstatement should be found in the particular, it should not vitiate the sale.⁴

15. On a sale under a decree, the abstract stated, that the vendor was devisee of A., who took as heir to B., and, on inquiry, the vendor's solicitor confirmed that statement; and the master accordingly approved of the title. Just before the conveyance was executed, the purchaser discovered that C.

¹ Clermont v. Tasburgh, 1 Jac. & Walk. 112.

² Sherwood v. Robins, Moody & Malk. 194.

³ Robinson v. Musgrove, 2 Moody & Robinson, 92.

⁴ Leach v. Mullett, 3 Car. & P. 175.

was the heir of B., and it appeared that the solicitor had received information of that fact, but concealed it. A motion by the purchaser, to be discharged from his purchase, was granted, though the vendor had obtained a release from C. before the motion was made.¹ So the defendant, on the 31st of March, agreed to grant to the plaintiff a lease, habendum from the 29th of September next, for twenty-one years, in consideration of £1,000, of which £10 was paid down, £90 was to be paid on the 13th of April, and the residue on having possession. The plaintiff, being called upon to pay the £90, demanded an abstract of title, which was refused; whereupon he gave notice that he would rescind the contract, and commenced an action to recover the £10. It appeared that, when the action was commenced, the defendant had no power to grant the lease contracted for. Judgment for plaintiff.²

16. But, as has been already seen, (Chap. 13,) the chancellor will not always rescind a contract, because the vendor has not a title to the whole of the land, but will decree to the vendee compensation *pro tanto*.³ (a) Thus, where a sale at auction is *bonâ fide*, the title good, the quantity of land the same, and the description substantially true, though slightly

¹ Dalby v. Pullen, 3 Sim. 29.

³ Collard v. Groom, 2 J. J. Marsh.

² Roper v. Coombes, 6 Barn. & Cress. 488; Reynolds v. Vance, 4 Bibb, 215. 534.

(a) The cases upon this subject, however, are not uniform, but vary with the particular circumstances and equities of each. Thus it has been held, that equity will not compel specific performance, unless the vendor can make a good title to *all* the land sold. Hepburn v. Auld, 5 Cranch, 278. So it is held, that a party applying for specific execution of a land contract will not be compelled to take *lost* land; but, if part of the land described be lost, he has the election, to take the safe part, and go for damages as to the other, or he may refuse the land saved, and go for damages for the whole. Rankin v. Maxwell, 2 A. K. Marsh. 494. So, where there was an outstanding title to five hundred and seventy acres of the land purchased, the owners of which obtained possession after the purchase; held, equity would decree a rescission of the contract, after judgment on the notes given to secure the purchase-money. Parham v. Randolph, 4 How. (Miss.) 435.

defective or variant, specific performance will be decreed. As where two adjoining lots were sold together, in one parcel, for one price, and on one of them were buildings, which projected two feet on the other. Held, this was not so material a defect in the subject, or variation from the description at the sale, as would entitle the purchaser to abandon the contract. But, as the projection was not so obviously visible as to conclude the purchaser, if he had exercised ordinary vigilance; and as the advertisement described the buildings as being on one of the lots; the purchaser was entitled to compensation, to be deducted from the price.¹ So, a bond being given, to make title to a particular tract of land, which should contain a certain number of acres, but not to convey any other specific lands to make good a deficiency; the only remedy for such deficiency, is a proportional compensation in money according to the price agreed on for the whole tract, with interest. And, where a plaintiff sues in chancery, for conveyance of a specific tract, and also of other lands, to make up a deficiency of quantity, (relating to which deficiency he prays a discovery,) but, according to the contract, appears entitled to compensation in money, and not in lands; the Court, after decreeing the first-mentioned conveyance, (the deficiency, and the sum to be allowed for it, being ascertained,) will go on to decree the compensation.² So want of title to fifty acres, part of a tract of eight hundred and odd acres, not appearing to be important to the purchaser, is no ground for a rescission, but for compensation.³ So the sale, by auction, of a lot described as a certain and limited body of a given extent, cannot be rescinded, for a deficiency in measure of less than one twentieth of the whole.⁴ So a trustee, appointed by the court of chancery, sold an entire tract of land, at a certain price per acre, and the sale was ratified. At the time of sale, it was known to the trustee and the purchaser, that a bill was pending for the recovery of an interest in such land, in opposition

¹ *King v. Bardeau*, 6 Johns. Ch. 38.

² *Chinn v. Heale*, 1 Munf. 63.

³ *Buck v. McCaughtry*, 5 Monr. 230.

⁴ *Soule v. Heerman*, 5 Miller, (Louis.) 358.

to the *cestuis que trust*. On that bill, it was finally decreed, that the complainants were entitled to one fourth of the property. After this decision, the purchaser filed a petition in Chancery, setting it forth, and claiming to vacate the sale, on the ground that he was induced to make the purchase, because of its proximity to his own estate, and an important road, leading from his estate through the purchased premises, and connecting them together. But, the existence of the road not being proved, the sale being made in perfect good faith, and it appearing that the quantity of land to be obtained from the trustee was not a material consideration in the purchase; that the trustee could make a good title under the decree to three fourths of the land; that the petitioner had secured to himself three fourths of the remaining fourth part; and that the trustee was placed in a situation, by a deed from the party having the right, to give a title to the other fourth of that part, which, if the petitioner chose to accept it, would secure to him the entire object of the purchase, without loss; held, that he could not be discharged from his contract, when the enforcement of it, subject to a proportionate deduction for that which he had purchased from others, would do him no injury.¹ And in general it may be stated, that, on a bill for specific performance, if the vendor be not able to make a conveyance of the entire estate sold, the purchaser may insist for the specific thing, so far as the right of the vendor extends, and compensation out of the purchase-money for any embarrassment of the title, or deficiency in the number of acres sold;² that, although a purchase of lands cannot be dissolved in part and affirmed in part; yet, if part of the land is lost, the vendee may coerce a title for the part saved, and compensation for the part lost;³ and that, where a sale has been in part executed by a conveyance of part of the land, and the vendor is unable to convey the residue,

¹ Weems v. Brewer, 2 Harr. & Gill, 64; Westervelt v. Matheson, 1 Hoffm. 390.

² McKay v. Carrington, 1 McLean, ³ Step v. Alkire, 2 A. K. Marsh. 259.

equity will decree repayment of a proportionate part of the purchase-money with interest.¹

17. Rescission of the contract may be *presumed* or *implied*; as, for instance, from lapse of time. Thus an action was brought on a written agreement, reciting that, whereas the defendant had sold to the plaintiff a lot of land, who had agreed to pay him £300 by a certain day, and to execute a bond and mortgage to secure the payment; the defendant therefore promised and agreed to deliver a good and sufficient deed for the land, on delivery of the bond and mortgage. Held, being a mutual agreement, there was a valid consideration; and, being signed by the party to be charged, it was sufficient under the Statute of Frauds: but, four years having elapsed from the date of the agreement, before the plaintiff gave notice to the defendant that he should insist on the agreement, and five years before he tendered a performance on his part; it was presumed that the parties had rescinded the contract, although the defendant had, within a year after the contract, sold and conveyed the land, so as to incapacitate himself to perform his agreement.² So the defendant gave the plaintiff a note, payable on time, with interest annually, the plaintiff agreeing in writing, upon payment at maturity, to convey certain premises to the defendant. The defendant took possession under a lease, agreeing to pay a certain rent, if the note were not paid at maturity, and remained in possession. The note was not thus paid. The plaintiff resumed possession, but the defendant continued to occupy under a lease. Held, this was a disaffirmance of the contract by the plaintiff, and equivalent to payment of the note; upon which no suit would afterwards lie.³

• 18. The right to rescind may be *waived*. Thus, a condition of sale was, that, in case the purchaser should raise objections to the title, which the vendor should not be able

¹ Pratt v. Law, 9 Cranch, 458.

² Ballard v. Walker, 3 Johns. Cas. 64.

³ Porter v. Vaughn, 26 Verm. 624.

or willing to remove, the vendor might rescind the contract, on notice and repayment of the deposit to the purchaser; objections not delivered within fourteen days after the delivery of the abstract to be treated as waived, in which respect time was to be essential. The purchaser returned the abstract with queries within the fourteen days, and the vendor answered the queries; the purchaser on the same day objected to the answers; the correspondence on the subject of the title continued for several weeks, and then the vendor gave notice that he rescinded the contract. Held, the continuance of the treaty after the first objection was a waiver of the condition; more especially as such a condition ought to be discouraged, and not to receive a construction oppressive on the purchaser; that the vendor's right to rescind must be coextensive with the purchaser's right to object to the title.¹ So if a purchaser, after delivery of the abstract, which shows part of the estate to be subject to a right of sporting not mentioned in the particulars, enters into possession, he waives that objection; and a subsequent offer of compensation, made by a clerk of the vendor's solicitor, without express authority, is of no effect.² So if a purchaser pay part of the purchase-money, and occupy some time under the contract, he cannot, on the vendor's breach of his agreement to convey, rescind the contract, and recover back the money in *indebitatus assumpsit*; his only remedy is on the special contract.³ So a condition of sale provided, that, if the purchaser should raise objections to the title, which the vendor should not be able or willing to remove, the vendor might rescind, and that all objections not taken in writing, within ten days after delivery of the abstract, should be considered as waived. Held, the condition referred to the first delivery of objections, and, if the vendor expressed his willingness to answer them, he could never afterwards rescind.⁴

¹ Morley v. Cook, 2 Hare, 106.

² Burnell v. Brown, 1 Jac. & W. 168.

³ Barickman v. Kuykendall, 6 Blackf. 21.

⁴ Tanner v. Smith, 10 Sim. 410.

19. The right to rescind a written agreement may not apply to a subsequent parol agreement, by which the former has been *waived*. Thus, an agreement was entered into by A., for the sale of an estate to B., to be completed, and the purchase-money paid, on or before the expiration of five years; in the mean time, interest to be paid half-yearly; the vendor reserving a right to avoid the contract, if the interest should be in arrear for twenty-one days. To enable B. to pay the interest, then in arrear, C. advanced a sum of money, on mortgage of B.'s interest, and A. afterwards verbally agreed with C. to extend the term for the payment of the half-yearly interest. The interest became afterwards in arrear, in such a way that A., by the original agreement, had a right to annul the contract, but he had no such right under the varied agreement. A. reëntered as for a forfeiture. The Court, on the application of C., appointed a receiver over the property.¹

20. To obtain a rescission, it is not necessary to pay the whole of the purchase-money. Thus, where negotiable notes have been given, and are outstanding, Chancery will interpose.²

21. Purchase of land in Ohio, from a vendor in Virginia, to be paid for by instalments. On the failure of any of the payments, the vendor, by giving notice, and paying into the Bank of Virginia, his heirs, executors, or administrators, to have a right to annul the contract. Held, the contract, except by consent, could be annulled in no other manner.³

22. By conditions of sale, all objections to the title were to be taken away within twenty-eight days from the delivery of the abstract, and, if not removed within fourteen days, the vendor might annul the contract on payment of the deposit, but without costs. The purchaser having made a valid objection, which was not removed, the vendor gave notice to annul the contract. Held, the vendor might avail

¹ Dawson v. Yates, 1 Beav. 301.

² McKay v. Carrington, 1 McL. 50.

³ Ibid.

himself of the condition ; otherwise if, in giving the notice, he had sought improperly to escape from the performance of a duty, which, by the nature of the contract, he was bound to perform.¹

23. A proviso that, in case the vendor cannot produce a title, or the purchaser shall not pay the money, on the appointed day, the agreement shall be utterly void, gives an option to the vendor to rescind the sale, in case the vendee does not pay the money, and to the purchaser to rescind, in case the vendor does not make a title ; but not *vice versa*.²

24. It is the prevailing doctrine, that, if the purchaser has paid any part of the purchase-money, and the seller refuses to complete the contract, the purchaser may elect either to affirm the contract, by bringing an action for its non-performance, or disaffirm it by an action for money had and received. The latter remedy lies, if there be a defect in the title which the vendor fraudulently suppresses, and receives a part of the purchase-money.³ (a)

25. In an action for the general breach of an agreement respecting the purchase of a house, the declaration need not state a collateral representation made at the time of sale, as that the house was in repair, &c.⁴

26. Where a contract is entered into for the purchase of an estate, by certain persons in their own names, but in fact on their own account, and also as agents for others, a bill to rescind the contract may be filed in the names of all the parties.⁵

27. Where partners are numerous, a bill may be filed by

¹ Page v. Adam, 4 Beav. 269.

⁴ Thomson v. Miles, 1 Esp. Ca.

² Roberts v. Wyatt, 2 Taunt. 268. 184.

³ Lyon v. Annable, 4 Conn. 350 ;
Putnam v. Westcott, 19 Johns. 73.

⁵ Small v. Attwood, You. 407.

(a) Contrary to this rule, it has been held in New York, that where, on a contract to pay for and receive a conveyance of land, the money has been paid, but no conveyance given, the vendee cannot rescind, and sue for the purchase-money and interest, but must bring his action on the contract as still subsisting. Fuller v. Hubbard, 6 Cowen, 13.

some of them on behalf of themselves and the others to rescind the contract, if manifestly for the benefit of all.¹

28. With regard to the respective rights of the parties after a sale has been rescinded, if the vendee has had possession, he must account for the profits exceeding the improvements.² He has a *lien* on the land for his purchase-money and interest, and the value of the improvements, and is liable to rents, &c.; but both interest and rents should run only from the date of the prayer to dissolve the contract.³ So, when a sale of land which the purchaser has paid for, and was put in possession of, is rescinded, for causes free of fraud; the use of the money, and the use of the land, are held to balance each other; and the decree should, in general, restore the money to the purchaser without interest, the land to the vendor without rents or profits. But, if the purchaser has made valuable and lasting improvements, or if the land has suffered in his hands through neglect or mismanagement; these are subjects of valuation, account, and final settlement by the decree.⁴

29. But it has been held that the vendee cannot maintain a distinct action at law for the improvements. Thus, the plaintiff's intestate entered into a parol agreement, in 1803, with the defendant, for the purchase of 100 acres of land; took possession, paid part of the purchase-money, cleared part of the land, made improvements, and died in 1807. The plaintiff, his administrator, tendered the residue of the purchase-money, and demanded a deed; but the defendant refused to receive the money or execute a deed, and took possession of the land. The plaintiff then brings *assumpsit* for the money paid, and also for the work and labor performed and improvements made on the land by the intestate. Held, the contract was rescinded, and the plaintiff was entitled to recover back the money, but not for the labor or improvements.⁵

¹ *Small v. Atwood*, You. 407; 3 Y. & Coll. 105.

² *Bullock v. Beemiss*, 1 A. K. Marsh. 434.

³ *Griffith v. Depew*, 3 A. K. Marsh. 180.

⁴ *Williams v. Rogers*, 2 Dana, 375.

⁵ *Gillett v. Maynard*, 5 Johns. 85.

CHAPTER XVIII.

GROUNDS FOR AVOIDING A SALE.—MISTAKE.

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| 1. General remarks.
3. Mistake, what.
4. Ignorance or mistake of law and fact.
8. Equitable relief in case of mistake ; mode and extent of.
10. <i>Compensation or rescinding</i> in case of mistake ; <i>quantity</i> of land sold and conveyed ; sale in gross, or by boundaries ; <i>more or less</i> , &c. | 16. Title to <i>part</i> of the property sold ; when sufficient.
17. Compensation.
22. Rescission of the sale.
25. Rights of <i>the vendor</i> in case of mistake.
30. <i>Waiver</i> .
33. <i>Reforming</i> of agreements.
40. Parol evidence. |
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1. HAVING in the foregoing chapters considered the subjects of *title* to the property sold, and of the right to *rescind* the sale for want of title ; we now proceed to a general statement of the grounds, upon which a sale of real property may be avoided, whether connected with, or wholly independent of, the question of title. The subject is, of course, an extensive one, and involves many subordinate topics, some of which have little in common, except that they alike constitute causes, which render a sale wholly or partially void or voidable.

2. The failure of title, in whole or in part, which has already been considered with reference to its bearing upon the contract, is to be understood as unaccompanied with deceit, fraud, or intentional misrepresentation. In the view now to be taken, these will be found essential elements of the defective title ; consisting either in positive falsehood, negative concealment, or that kind of implied fraud which grows out of the personal incapacity of a contracting party. There is, however, one among this class of causes for avoiding the contract, which is more nearly connected than the others with simple defects of title ; and therefore, in the

natural succession of subjects, should be first of all considered. We refer to *mistake*. In the absence of fraud, this of course is the only remaining explanation of want of title, and it has therefore been already incidentally considered in the foregoing chapters. It was also briefly adverted to in the introductory chapter upon the distinction between executed and executory contracts, (Chap. 1, s. 40.) But as a distinct ground for avoiding or varying the contract, resisting specific performance, or claiming compensation in damages, it now remains to be fully considered. It will at once be seen that, with reference to this particular topic, it becomes necessary to depart from the prevailing plan of the present work, and to speak of executed conveyances of real property, no less than of executory contracts to convey it; because the most frequent class of *mistakes* consists in a variance between the property conveyed and that contracted for; and *the reforming of deeds* is one of the most common exercises of the powers of a Court of Equity in relation to this extensive subject.

3. *Mistake* is defined, as "an error committed in relation to some matter of fact affecting the rights of one of the parties to a contract.¹ It is also said, "mistakes in making a contract are distinguished ordinarily into, first, mistakes as to the motive; secondly, mistakes as to the person with whom the contract is made; thirdly, as to the subject-matter of the contract; and lastly, mistakes of fact and of law."²

4. Ignorance of *title*, or, which amounts to the same thing, *mistake* of title, (a) is said to be partly *of law* and partly *of*

¹ 2 Bouv. L. D. 178.

² Ibid.

(a) As to the distinction between these terms, see Story on Equity, § 140, n. 2; *Champlin v. Laytin*, 18 Wend. 407. *Surprise* is also a term of similar import. Thus it is held, that a party shall not be entitled to specific performance, in case of any *surprise*, making it not fair and honest to call for it, but will be left to law. *Mortlock v. Buller*, 10 Ves. 292. So a lease, with covenant for perpetual renewal at a fixed rent, of premises held under a church lease, renewable upon fines, which were continually increasing,

*fact.*¹ (a) Viewed, respectively, in these different aspects, it has been in some cases held a sufficient, and in others an insufficient ground for avoiding a sale or purchase of real property. The prevailing doctrine of our law is, that *ignorance of law* can never be set up as a ground of action or defence, "*ignorantia legis neminem excusat.*" (b) Hence, a mistake, as to the rights growing out of a known state of facts, is not, in general, sufficient to avoid a contract, in which those rights are involved; while a mistake as to the facts them-

¹ 1 Story Eq. 132, § 120.

was decreed to be delivered up on the ground of surprise, neither party understanding the effect of it. *Willan v. Willan*, 16 Ves. 72.

(a) The question of heirship, for instance, has been held to partake of both elements. Story, § 122, n.

(b) In *Lansdowne v. Lansdowne*, Mosel. 364; 2 Jac. & W. 205; Lord King remarked, that this maxim applies only to *crimes*, not in civil cases. The facts of that case were these: The plaintiff, who was heir at law and son of the eldest brother, had a controversy with his uncle, the youngest brother, as to the question which was heir to another deceased brother of his uncle. They consulted a neighboring schoolmaster, who, upon examining the Clerk's Remembrancer, gave his opinion in favor of the uncle, because lands could not ascend; upon which the parties agreed to divide the lands, and accordingly executed, first a bond and then a conveyance. The plaintiff brings a bill for relief from these instruments, alleging that he had been surprised and imposed upon by the schoolmaster and his uncle. The uncle being dead, his son and the schoolmaster were made defendants; and the latter admitted in his answer, that he had given the opinion, being misled by the book, and that he had recommended to the parties to take further advice; but that the plaintiff had afterwards told him, that, if his uncle would, he would agree to share the land between them, let it be whose right it would, and thereby prevent all disputes and lawsuits. Upon which the schoolmaster prepared the papers, and they were executed. Lord Chancellor King decreed, that the bond and conveyances were obtained by mistake, and misrepresentation of the law, and ordered them given up to be cancelled.

This case was closely criticized and doubted by the Supreme Court of the United States, in *Hunt v. Rousmaniere*, 8 Wheat. 214; 1 Pet. 215: and also by Lord Cottenham, in *Stewart v. Stewart*, 6 Clark & Fin. 966; and, so far as it proceeds upon a mere mistake of law, is undoubtedly opposed to the weight of authority. See Story on Equity, ch. 5, *Mistake*.

selves, which constitute the other element of title, may furnish good ground in equity for relief. (*a*)

5. Thus, if an executor purchase lands belonging to his testator's estate, at a public sale made by himself and his co-executors, under a mistake of law as to the power of sale conferred on them by the will, he cannot be relieved in equity.¹

6. A testator devised to his wife the use of all his real estate, until his son came of age, if she should continue his widow, and, if she should marry again before his son came of age, he bequeathed to her certain personal property. The widow thus married, and received the bequest. The land was sold at sheriff's sale, as the property of the son. The widow, her husband, and the purchaser entered into an indenture under seal, reciting the purchase, subject to the widow's claim by right of her deceased husband; and agreeing that one third of the income should be paid to her for

¹ Dill v. Shahan, 25 Ala. 694.

(*a*) It has been held, however, that a contract entered into under a mutual misconception of legal rights, amounting to a mistake of law in the contracting parties, by which the object of it cannot be accomplished, is as liable to be set aside or rescinded, as contract founded in mistake of matters of fact. *Champlin v. Laytin*, 1 Edw. 471.

Where an instrument is drawn and executed for the purpose of carrying into effect a previous contract, written or parol, which, by mistake of the draftsman, in fact or in law, does not fulfil the intention of the parties; equity will correct the mistake. *Rogers v. Atkinson*, 1 Kelly, 12; *Collier v. Lanier*, 1 Kelly, 238. So it has been held, that, where property has been conveyed, through mistake, which the parties never intended should be conveyed, which the grantor was under no legal or moral obligation to convey, and which the grantee could not, in good conscience retain; Chancery will correct the mistake, whether it arose from a misapprehension of the facts, or of the legal operation of the deed. Otherwise, in general, where the conveyance was such as the parties intended, and the grantee may in good conscience retain the property; although the grantor may mistake the extent of his title. *Stedwell v. Anderson*, 21 Conn. 139. It is held that Equity will not relieve for mistake of law, unless such a mistake be a *gross* one. *Haden v. Weare*, 15 Ala. 149.

life. The statute of Pennsylvania of April 4, 1797, provides, than any devise or bequest to the testator's widow shall be in lieu of dower, unless the testator otherwise declare, or the widow elect to take her dower. Held, the purchaser was bound to perform his agreement.¹

7. A bill in Chancery, brought by a son against his father, alleged, that it was agreed between the parties, that the plaintiff should purchase of the defendant a farm of the value of \$4,000, and give two promissory notes, one for \$2,000 on demand with six per cent. interest, the other for the same amount, with five per cent. interest, payable at the decease of the defendant, and then to be delivered up unpaid to the son as his portion of the father's estate; that the parties thereupon applied to a Justice of the Peace, to draw the necessary writings to carry such agreement into effect; but by accident, and through their own want of knowledge, they failed to give him the information requisite for this purpose, and he drew the last-mentioned note payable in three years, and omitted the stipulation that it should be delivered up at the death of the father, unpaid, which note was signed by the plaintiff, he being ignorant of the operation of law thereon; that the defendant had brought an action on such note, and was endeavoring to enforce it; and praying for an injunction and other relief. Held, 1. That the mistake was not a mistake of fact, but of law. 2. That parol evidence was inadmissible to prove the agreement set forth. Bill dismissed.²

8. With regard to the mode and extent of the relief afforded by Courts of Equity for mistakes of fact, it is held that equity will relieve against mistakes as well as frauds, either in a deed or contract in writing; and this, either where the plaintiff seeks relief affirmatively, on the ground of mistake, or where the defendant sets it up as a defence, or to rebut an equity.³ So, it seems, either by requiring the re-

¹ *McAninch v. Laughlin*, 13 Penn. 371.

² *Wheaton v. Wheaton*, 9 Conn. 96.

³ *Rogers v. Atkinson*, 1 Kelly, 12;

Collier v. Lanier, Ib. 238; *Goodell v. Field*, 15 Verm. 576; *Rosevelt v. Fulton*, 2 Cow. 129.

funding of money paid under the contract, or by annulling the contract itself.¹ Thus the common mistake of both parties to a contract is held to avoid such contract.² So, specific performance of an agreement being a subject of discretion, it is refused in case of mistake, though there be no fraud.³ So trustees will not be compelled to perform an agreement entered into under mistake, to sell for an inadequate consideration.⁴ So relief is given against a contract, where the purchaser knew that the vendors, the assignees of a bankrupt, were ignorant of a circumstance considerably increasing the value.⁵ So a conveyance obtained from persons uninformed of their rights is set aside, though there was no actual fraud or imposition.⁶

9. But it is equally well settled, that Courts of Chancery will not interfere to correct alleged mistakes in contracts and deeds, or set them aside, unless those mistakes are admitted by the defendant's answer, or very conclusively proved.⁷ Thus, evidence drawn from the admissions of parties, in a casual conversation, when they are not supposed to state all the facts in relation to a particular subject, has been held not satisfactory for this purpose.⁸ So it is said, "It must be plainly made out, that the parties meant in their final instruments merely to carry into effect the arrangements designated in the prior contract or articles. The very circumstance, that the final instrument of conveyance or settlement differs from the preliminary contract, affords of itself some presumption of an intentional change of purpose or agreement, unless there is some recital in it, or some other attendant circumstance, which demonstrates, that it was merely in pursuance of the original contract."⁹ So it is held, that the party suffering from mistake must take *prompt* steps for relief.¹⁰ And, if the contract is made under a mutual

¹ Champlin v. Laytin, 18 Wend. 407; Griswold v. Smith, 10 Vern. 452.

² Stapylton v. Scott, 13 Ves. 427.

³ Mason v. Armitage, 13 Ves. 25.

⁴ Bridger v. Rice, 1 Jac. & Walk. 74.

⁵ Turner v. Harvey, Jac. 169.

⁶ Evans v. Llewellyn, 2 Bro. C. C. 150.

⁷ Griswold v. Smith, 10 Vern. 452.

⁸ Cleavland v. Burton, 11 Vern. 138.

⁹ 1 Story's Eq. 169, § 152; 177, § 160.

¹⁰ Beard v. Hubble, 9 Gill. 420.

mistake as to the title, the vendee is entitled to a rescission, if he seeks it *in a reasonable time* after discovery of the mistake, and abandons the possession, delivering or offering to deliver it to the vendor; the right to rescission not depending upon his payment or offer of the purchase-money, nor upon the vendor's insolvency, but upon his own promptness in seeking such rescission.¹ (See s. 30.)

10. We have already had occasion (Chaps. 13, 17,) in considering the general subject of title, to discriminate between the different classes of cases, in which mistakes occur, with regard to the property sold, or its quantity or value; sometimes not in any way affecting the validity of the contract; sometimes merely giving the right of compensation or indemnity; and sometimes authorizing an entire rescission. At the risk of occasional repetition, it becomes necessary, in the present connection, as bearing directly upon the subject of this chapter, to consider the effect of *mistake* upon the binding authority of the contract of sale and purchase, in the threefold aspect above mentioned.

11. The most common mistake in sales of real estate relates to the *quantity* of land conveyed, as compared with the agreement or intent of the parties upon that subject. The general principle is laid down, that the vendor of land, as containing a certain quantity, *more or less*, when he knows from the title deeds or otherwise, that it contains a much less quantity, is in equity bound to make good the difference. But, where a contract has been consummated without any fraud, misrepresentation, or concealment as to the quantity, the Court will not inquire whether there has been a mistake upon that point.² So, if the vendor sells, and the vendee buys, a tract of land, for so many acres, more or less, and it turns out upon a survey, that there is less than the estimated quantity, the buyer shall not be relieved in equity.³ Where a specified tract of land is sold for a sum in gross, the boundaries control the description of the quan-

¹ Smith v. Robertson, 23 Ala. 312.

³ Jolliffe v. Hite, 1 Call, 262.

² Veeder v. Fonda, 3 Paige, 94.

tity, and neither party can have a remedy against the other, for an excess or deficiency, unless it is so great as to furnish evidence of fraud or misrepresentation; otherwise, where the mistake is in the boundaries, and not in the quantity of acres. So where the deficiency is not in the thing described, but in the ability of the defendant to convey it.¹ So it is said, the cases in which equity interferes, where the quantity of the land exceeds or falls short of that specified in the deed or contract, are those in which the sale has been made *by the acre or foot*; or where there has been fraud or wilful misrepresentation on the part of the party against whom relief is sought.² So where there is a written contract for the sale of land by the acre, equity will not relieve the purchaser on the ground of a mutual mistake as to the boundaries, unless the mistake be fully and clearly proved.³

12. But in case of a sale of land by the acre, relief is to be granted for all deficiencies, not reasonably imputable to the variation of instruments, and small errors in surveys, whether the purchaser has expressly retained an election to have the tract surveyed or not.⁴ And this principle is not departed from, but in case of a sale by the tract, the purchaser clearly agreeing to take the hazard of all deficiencies upon himself.⁵ (a)

¹ Voorhees v. De Meyer, 2 Barb. 37.

² Morris, &c. v. Emmett, 9 Paige, 168.

³ Leas v. Eidson, 9 Gratt. 277.

⁴ Nelson v. Carrington, 4 Munf. 332.
See Quesnell v. Woodlief, 2 H. & M.
174; Nelson v. Matthews, Ibid, 164, 181.

⁵ See Joliffe v. Hite, 1 Call, 301, 329;
Hull v. Cunningham, 1 Munf. 336;
Grantland v. Wight, 2 Munf. 179; Du-
vals v. Ross, Ibid, 290.

(a) If A. purchase a tract of land as "containing about a specified number of acres, more or less, at a certain price per acre, the quantity to be ascertained by actual survey, if A. shall require it;" this is a sale by the acre, if A. shall require the survey. And if no time be specified for making his election, he may demand the survey at any time before the whole business shall have been concluded, and a title to the land made or tendered by the vendor. So though he has taken possession, or given bonds for the purchase-money. Nor is such right necessarily limited by the last day of payment; for even then he is not bound to part with the purchase-money, nor to make a final adjustment of the balance due, unless a title is made or tendered, agreeably to the contract. 4 Munf. 332.

13. The plaintiff sold to the defendant three tracts of land, "containing nine hundred ninety-one acres and a quarter, and allowance, at twelve shillings and sixpence per acre." The plaintiff afterwards obtained patents in his own name, and executed a conveyance of the tracts to the defendant, describing them by courses and distances according to the patents, and as "containing in the whole nine hundred ninety-one acres and a quarter, and allowance, &c., be the same more or less." The defendant, having previously paid a part of the purchase-money, gave his bonds for the balance on the day after the conveyance, with a mortgage on the three tracts, stating them to contain "in the whole nine hundred ninety-one acres and a quarter, and allowance," and describing them by courses and distances. Upon a survey made twelve years afterwards, the tracts were ascertained to fall short 88 acres, 48 perches. Held, the defendant was not entitled to any deduction from his bonds on account of the deficiency.

14. Bond to convey a lot of land; number 78, in the township of Lysander, &c., containing 600 acres. A deed was delivered, describing the lot as "containing 600 acres, be the same more or less." On actual survey, the lot was found to contain only 421 $\frac{1}{8}$ acres. In an action on the bond, held, the mention of the quantity of acres was matter of description, and the delivery of the deed for the lot, according to its usual and known description, was a performance of the bond.¹

15. Agreement by A. in November, 1811, to convey "all his plantation in L. township, adjoining lands of D., B., and others, reference being had to several deeds of conveyance to A. will show the metes and bounds; the whole tract contains 225 acres and allowance; 201 acres the said A. has a patent deed for, and the remaining 24 he will also get a patent deed for." In April, 1812, a conveyance was made of 225 acres, more or less, the hand money paid, and bonds

¹ Mann v. Pearson, 2 Johns. 37.

given for the residue. In 1823, the vendee discovered by actual measurement, that the patented tract fell short 20 acres and 90 perches. Held, he was not entitled to any deduction, in a suit on one of the bonds, for this deficiency.¹

16. We have heretofore (Chap. 13,) spoken of the effect upon the sale of a *partial want of title*. This is to be understood as the result of *mistake*; inasmuch as any *fraud* of the vendor avoids the sale, alike whether the failure of title be partial or total. Upon this subject it has been held, that, where land is sold at auction in separate lots, and several are purchased by one person, this is not an entire contract; and, if the vendor cannot give a title as to all the lots, the vendee cannot rescind the agreement *in toto*, but must take a conveyance of such as he is authorized to convey. In such case, the vendor is bound, if required, to give separate deeds, and his offer to execute one deed for the whole does not render the contract entire.² So the complainant sold at auction to the defendant several parcels of adjoining land, separately, but delayed several years to execute the conveyances, though importuned to do so. Afterwards the defendant discovered, that the title of one of the tracts, a principal one, was not in the vendor; and refused to complete the purchase, alleging that this tract was the principal object of the purchase, but offering on the trial no proof of this allegation. Held, there was no ground to vacate the contract; that the delay in executing the conveyances should not prevent a specific performance, but was ground only for deducting interest.³

17. With regard to the right of *compensation* for partial failure of title; it is held that a *Court of Equity* may inquire into all the circumstances, and ascertain how far one part of the bargain induced the rest, and award compensation accordingly; but *at law*, a vendor cannot, on an entire contract, recover any part of the purchase-money, where he

¹ Frederick v. Campbell, 13 S. & R. 136; M'Lelland v. Creswell, Ib. 143.

² Van Eps v. Schenectady, 12 Johns. 436.

³ Osborne v. Bremar, 1 Desaus. 486.

cannot make title to the whole estate, nor is a purchaser entitled to retain that part, the title to which is good, and vacate the contract as to the rest.¹ Thus it is held that, where a farm is sold for a gross sum, or at so much per acre, and the quantity mistaken by the parties, equity will relieve the party injured. The vendee has a right to take the farm at the price of the real number of acres, and to have compensation for the deficiency, if he has paid the consideration. But it may be otherwise, if the statement of the quantity be mere matter of description, and not of the essence of the contract; as where the contract contains the words "more or less," or "containing by estimation," &c.; although, if there be any fraud or wilful misrepresentation of the quantity, equity will afford relief even in these latter cases.² So, if the title to part of the land sold fails, the vendee may claim a specific performance as to the remainder, and a compensation in damages.³ More especially, want of title to an unimportant part of the ground is a subject of compensation, not a ground for rescission.⁴ So, where a purchaser cannot get a title to all he contracted for, if he can get *the substantial inducement* to the contract, he may insist upon taking, or he may be compelled to accept, a title, with reasonable compensation.⁵ So, in a sale of land by the acre, and not of a tract in gross, if an unusual and unreasonable excess or deficit appears, Chancery will relieve; particularly if the deed contains no indication that the vendor intended to sell the tract "more or less."⁶ Thus a mistake of the parties, in a sale by the acre, of the boundaries of the patent under which the vendor sold, whereby he sold and conveyed 1000 acres outside of the grant; is ground for relief against payment of so much of the purchase money; although, the land not obtained not being

¹ Johnson v. Johnson, 3 B. & P. 162; Chit. on Contr. 303.

² Stebbins v. Eddy, 4 Mas. 414.

³ Morss v. Elmendorf, 11 Paige, 277. 343.

⁴ Durrett v. Simpson, 3 Monr. 519.

⁵ Evans v. Kingsberry, 2 Rand. 120.

⁶ Whaley v. Eliot, 1 A. K. Marsh.

material to the purchaser, he cannot have a rescission.¹ (a) So, though land be sold in gross, for so much, be it more or less; yet, if both parties were clearly mistaken in a material point, as to the lines by which the vendor held, and there was no express agreement of the purchaser to take the risk, equity will give relief for the deficiency. But, unless the purchaser, by eviction or otherwise, lose the land he expected to get; as if he make an entry for it as vacant, and obtain a patent; the proper measure of relief is only the amount of his expenditures in procuring the patent, with a reasonable allowance for trouble, and actual costs of suit.²

18. Diminution of one hundred and seventy-one acres of high land, out of six hundred and sixty-two acres of high and swamp land. Notice was given at the sale that a claim existed, and that, if it succeeded, a proportional deduction would be made. Moreover, the purchaser voluntarily renewed the bond for the price in part to a third person, several years after the purchase; and the renewed bond had been assigned for valuable consideration. Held, no ground for a rescission; but that the purchaser was entitled to a deduction out of the original bond; also of interest till a resurvey by the vendor.³

19. In 1788, the defendant, owning a tract of land called Sion Hill, held by him and his forefathers under a survey upwards of a hundred years old, advertised it for sale as containing about eight hundred acres; and believing that, as it was an old survey, it would probably contain more than eight hundred acres, he afterwards sold it to the plaintiff, according as it had been held by him and his ancestors under the old survey, for £3,200, (equal to £4 per acre,) offering to survey it, if the plaintiff would pay at the same rate for the

¹ *Grant v. Coombs*, 6 Monr. 281.

³ *Wainwright v. Read*, 1 Desaus. 573.

² *Hull v. Cunningham*, 1 Munf. 330.

(a) Whether a sale of land be by the acre, or in gross, is a question of intention of the parties, to be collected from all the circumstances of the transaction. *Bierne v. Erskine*, 5 Leigh, 59.

excess ; which the latter, (who also believed that it contained more than eight hundred acres, as it was an old survey,) declined. Subsequent to the execution of the deed, the plaintiff had the land surveyed, and found it to contain much less than eight hundred acres. Whereupon he filed a bill in chancery, for a proportional deduction from the purchase-money. Held, the deficiency was too great for a purchaser, notwithstanding the sale was for eight hundred acres, more or less. Decree for a deduction, and also an indemnity against all charges and incumbrances on the estate.¹

20. Where a vendor erroneously supposes he has title to certain land, and contracts to sell and convey it, he cannot be compelled to convey an adjoining lot, to which he has title.²

21. A deduction, for want of title to part of the land, was directed to be taken equally off all the instalments.³

22. There is a still stronger class of cases, where equity will wholly *rescind* or *annul* the bargain, by reason of mistake of one or both of the parties. Thus it is said, that a vendor is bound to know *he actually has* that which he professes to sell. And, even though the subject of the contract be known to both parties to be liable to a contingency, which may destroy it immediately, yet, if the contingency has already happened, it will be void.⁴ Thus, if one person should sell a messuage to another, which was at the time swept away by a flood, or destroyed by an earthquake, without any knowledge of the fact by either party ; equity would relieve the purchaser.⁵ So, if a life-estate be sold, which, at the time of sale, is terminated by the death of the party in whom it is vested, but without the knowledge of either party ; equity will rescind the contract.⁶ So where a purchaser buys the interest of a vendor in a remainder in fee, expectant on an estate tail ; if, at the time of the contract, the tenant in tail

¹ Quesnel v. Woodlief, 6 Call, 218 ;
S. C. 2 Hen. & Munf. 173, n.

² Morse v. Elmendorf, 11 Paige, 277.

³ Grant v. Coombs, 6 Mon. 281.

⁴ Hitchcock v. Giddings, Daniel's
Exch. R. 1.

⁵ Hitchcock v. Giddings, 4 Price, 135.

⁶ Allen v. Hammond, 11 Pet. 71.

had actually suffered a recovery, of which both parties were ignorant till after the conveyance had been executed, and an absolute bond given for the purchase-money; equity will rescind the contract, on the ground that the vendor had no interest in the subject-matter at the time of the sale.¹ So where, by the mistake of both parties, one contracted to sell and convey, and the other to purchase and pay for, a supposed gore of land, which had in fact no actual existence; the vendee cannot file a bill in equity for specific performance, or for a compensation in damages.² So, where an estate is purchased at auction, under a mistake as to the lot put up for sale, the Court will not decree specific performance against the purchaser, but leave the vendor, if he has sustained any damage by the mistake of the purchaser, to his remedy at law. A bill for specific performance was accordingly under such circumstances dismissed, without costs.³ So where, at the time of entering into a contract for sale of a tract of land, there was a misunderstanding between the parties as to the identity of the land, to which the contract related; a court of equity, in its discretion, ought not to interfere by decreeing a specific performance.⁴

23. The general doctrine upon this subject is stated to be, that, in an executed contract, where there has been a gross mistake in the quantity sold, for "more or less," the complaining party, who has practised no fraud, nor any culpable negligence, nor impaired his equity in any other way, is entitled to relief in chancery. And his condition is still more favorable, where the opposite party comes into chancery for a specific execution; for then he must show that he has a clear right to it, equitably and conscientiously; otherwise he will be left to his legal remedy. With regard to the degree or amount of excess or deficiency necessary to constitute a *gross mistake*, a difference of 33 per cent., between the actual and the estimated quantity of land sold in the gross,

¹ Hitchcock v. Giddings, 4 Price, 135.

² Morss v. Elmendorf, 11 Paige, 277.

³ Malins v. Freeman, 2 Kee, 25.

⁴ Graham v. Hendren, 5 Munf. 185.

has been held to raise a presumption of such mistake, and give a claim to relief in chancery.¹

24. Although, as has been seen, (Ch. 13,) the conditions of sale provide that any error or misstatement in the particulars shall not vitiate the sale, but be made the subject of compensation to the vendor or purchaser, as the case may be; this condition will not apply to a wilful or fraudulent misstatement. Thus, where an estate thus sold was described as *about one mile* from Horsham, a borough town, when in fact it was between three and four miles; in an action to recover the deposit, Lord Ellenborough remarked, that the clause in question was designed to meet *unintentional* errors; not to compel the purchaser to complete the contract, if designedly misled; and left this question to the jury; who found a verdict for the plaintiff.²

25. The vendor as well as the vendee may claim relief on the ground of mistake. Thus, if lands be sold by metes and bounds; and the vendor covenant to warrant the title; he is bound to include, in a conveyance with warranty, and, in case of eviction, to make compensation for, all the lands within those bounds, which he held and claimed as his own at the time of sale, and showed to the purchaser as part of the lands sold; notwithstanding his title thereto may be defective. But not lands which were not thus held and claimed, nor thus shown; although his title papers may comprehend them.³

26. But when a tract is sold upon a conjectural estimate of the quantity, for a gross sum, and the variance is not very extraordinary, showing that it could not have been contemplated, there can be no relief. Thus it is held, that a surplus of forty or fifty acres, in a tract of one thousand, would not justify a decree for the value of the surplus.⁴ So if one, who has obtained a survey upon a land warrant for two thousand acres, sell and transfer it for valuable consideration, and

¹ Harrison v. Talbot, 2 Dana, 258.

² Norfolk v. Worthy, 1 Camp. 337.

³ Beverley v. Lawson, 3 Muntf. 317;

Innis v. McCrummin, 12 Mart. 425;

Morris v. Emmett, 9 Paige, 168.

⁴ Clark v. Bell, 4 Dana, 115.

assign the plat and certificate to the purchaser, whereupon he obtains a patent in his own name; and if, upon a resurvey, it appear that the grant conveys two thousand seven hundred acres; the vendor cannot in equity support a claim for the surplus against the vendee.¹

27. Upon a sale of land by auction, the advertisement described the tract as containing three hundred acres. On the day of sale, doubts being expressed as to the quantity, the vendor said, "he would sell it at three hundred acres, more or less, and he would sell it by the acre, and it should be measured;" and it was accordingly cried and sold at so much per acre. Held, the vendee was bound to take it, although a subsequent survey showed an excess of forty-five acres. Also, that, if the vendee refused to carry the sale into execution, and the vendor resold at a less price, the vendee would be liable for the loss. If the vendor acted *bonâ fide*, and with reasonable care, the measure of damages is the difference of price on the resale.² So, if A. contract to convey to B. one hundred acres of land, adjoining C., and make a deed, according to a mistaken survey furnished by a surveyor, calling for one hundred acres; and afterwards the tract is ascertained to contain one hundred and nineteen acres; A. is entitled to a reconveyance of the surplus.³ But a vendee, required to surrender a surplus, may elect from which end or side of the tract it shall be taken.⁴ So, where A. purchased of B. one hundred and sixty-five acres of land, but obtained from B. an obligation to convey all his right in the tract, that right being supposed to be only one hundred and sixty-five acres, but which turned out to be more; equity will not enforce the claim for the surplus.⁵ And, in general, whenever it does not clearly appear, that land was sold by the tract, and not by the acre, the vendee ought to be responsible for the value of the surplus land; which value is ordinarily to

¹ Vowles v. Craig, 8 Cranch, 371.

² Ashcom v. Smith, 2 Penn. 211.

³ Gilmore v. Morgan, 2 J. J. Marsh.

⁴ Harrison v. Talbot, 2 Dana, 266.

⁵ Smith v. Smith, 4 Bibb, 81.

be estimated by the average value, per acre, of the whole purchase.¹

28. Sale of a tract of land, described in a covenant for a conveyance, by its boundaries, and as containing four hundred acres, for \$6,000. It really contained four hundred and ninety acres; and the vendee files his bill for a conveyance of the whole for \$6,000. The vendor insists, that the sale was, in fact, by the acre, at \$15, the parties being under a mistake as to the quantity, which, from a family tradition, had been called four hundred acres; and that he had a right to retain the surplus, unless he was paid for it. Decree for the plaintiff.²

29. Where part of a tract of land is lost, but there is a surplus in the tract, for which the vendor is entitled to pay; and, the value of the surplus exceeding the loss, the latter is deducted, and a decree rendered for the balance; it should so appear by the decree; which should also release the vendor from his obligation to convey the lost land.³

30. A vendee may *waive* his right to rescind on the ground of mistake. Thus a sale was at first made of a farm, for so much per acre, to be ascertained by measurement. Afterwards, the parties agreed to waive any measurement, and the vendee took the farm at the gross sum of \$2,500, supposing it to contain fifty acres, from the representation of the vendor; which the vendor himself believed to be true. In the deeds, the quantity was stated to be forty-seven and a half acres, more or less. The real quantity was forty acres and a half. Held, the vendee was not entitled to relief in equity, each party having been well acquainted with the local boundaries of the farm.⁴

31. But equity will not hold the rights of a party to be waived, except by unequivocal acts or declarations of such waiver. Thus, in a case of mistake by conveying to a husband and wife, instead of conveying to the wife alone;

¹ *Hundley v. Lyons*, 5 Munf. 342.
See *Nelson v. Matthews*, 2 H. & M. 178.

² *Harrison v. Talbot*, 2 Dana, 258.

³ *Clark v. Bell*, 4 Dana, 115.

⁴ *Stebbins v. Eddy*, 4 Mas. 414.

upon a bill in equity brought after the death of the wife, by her heirs, it appeared, that more than twenty years had elapsed, between the execution of the deeds and the commencement of the suit; during which time, the defendant was in possession, and his wife never called upon him to rectify the mistake, or complained of it to him; but also, that he was unquestionably entitled to the use of the property, that there was nothing in the manner of that use adapted to awaken suspicion of mistake, and that she had no knowledge of the mistake, until about a year and a half before her death, and, when it was communicated to her, was troubled about it. Held, the lapse of time did not affect the rights of the plaintiffs.¹

32. The plaintiff purchased at auction a house, of which he did not know the position, by the description in the particulars of sale, of No. 58 on the north side of Pall Mall, opposite Marlborough House. The same particulars stated the amount of the rent, rates, and taxes of the house. The house was not in Pall Mall, but behind No. 57 Pall Mall, and only connected with Pall Mall by a narrow passage leading through the ground floor of No. 57, and communicating with the street by a door numbered 58. He did not make any objection to this, but, upon discovering that the cellars of No. 57 extended underneath this passage, and under a small part of No. 58, and that the floor of the passage was not very strong, he filed a bill to set aside the contract, and for the return of the deposit, with interest. Held, he was entitled to this relief, notwithstanding that by his conduct he had waived his right to object to the position of the house, upon the ground that the passage was not such an access to the house as he was entitled to expect, from the description.²

33. The ordinary course, as has been seen, for correcting mistakes by the interposition of a court of equity, is to re-

¹ *Stedwell v. Anderson*, 21 Conn. 139.

² *Stanton v. Tattersall*, 21 Eng. Law & Eq. 154.

scind the sale in whole or in part, or decree restitution of the purchase-money. The same object is also accomplished, by *reforming* the agreement or the conveyance in which a mistake is alleged and proved to have been made. (a) The general doctrine is, that a court of chancery will correct a written instrument, where through mistake it was written differently from the intention of the parties.¹ And such relief is not effected by erasures or interlineations of the instrument, but by injunctions, and orders for necessary and proper releases.²

34. It was agreed by a father and his children, three sons and a daughter, that referees should divide his real estate into two parts, assigning one part to two of the brothers, and the other part to the other brother and the sister. This being done, the brother and sister agreed, with the assent of the father, that the referees should divide their portion between the two, which was done; but, there being no buildings on the land assigned to the sister, they assigned to her an undivided half of the buildings. The father then caused deeds to be written by one of the referees, that to the sister being intended and supposed to be a deed of the part assigned to her by the last award. They were executed by the father, and delivered to A., to be delivered to the grantees on his death. By mistake, the deed to the sister did not include the undivided half of the buildings. Held, equity would decree, that deeds of release should be executed by the respon-

¹ Goodell v. Field, 15 Verm. 576.

² Smith v. Greeley, 14 N. H. 378.

(a) The general power of reforming contracts, as a distinct branch of equity jurisdiction, has not been conferred on the Supreme Court of Massachusetts. (See Statutes, 1847, ch. 214.) Babcock v. Smith, 22 Pick. 69. See Bellows v. Stone, 14 N. H. 175. Where neither fraud, mistake, or surprise is proved, a court of equity will not interfere to reform an agreement or deed, which is such as the parties designed it to be. A *conventional trust* cannot be set up on a special parol agreement, inconsistent with the terms of the deed. McElderry v. Shipley, 2 Md. 25.

dents to the orators, (the sister and her husband,) of one undivided half of the buildings.¹

35. Four sisters being the joint owners of land, they and their husbands mutually agreed, that it should be aparted to them in severalty. One of the husbands undertook to prepare deeds for that purpose; and by mistake, misapprehension, and ignorance, the name of each husband, as a grantee with his wife, was inserted. There was no intention, in any of them, to convey to the husbands a greater interest than they would be entitled to, as husbands; but, under the deeds, each husband took an estate in fee. One of the sisters died, without having had issue. Upon a bill in chancery, brought by her heirs at law, against her husband, who was in possession, claiming title under one of the deeds; held, as the defendant was concerned in making and carrying out the mistake, as he had paid nothing for the land, and as he was now holding it contrary to the intention and agreement of the parties, the plaintiffs were entitled to a decree in their favor, establishing the title in them.²

36. Where, by a mistake of boundaries in a deed, more land is included than was intended, equity will not reform the boundaries, after the land has passed to a *bonâ fide* purchaser without notice.³

37. In a bill to reform an agreement, on account of mutual misapprehensions, the Court, although they cannot reform the agreement, will afford relief by causing it to be set aside.⁴

38. A bill in equity to reform a conveyance, on the ground of accident or mistake, will be held defective on demurrer, unless the persons under whom the defendant claims by deeds of warranty, made since the alleged mistake or accident, are made parties; and unless an allegation is contained in the bill, that the grantees in such deeds purchased with notice of the mistake or accident.⁵

¹ Craig v. Kittredge, 3 Foster, 231.

² Stedwell v. Anderson, 21 Conn. 139.

³ Whitman v. Weston, 30 Maine, 285.

⁴ Bellows v. Stone, 14 N. H. 175.

⁵ Davis v. Rogers, 33 Maine, 222.

39. A bill to correct a mistake in a written agreement must not only state the agreement, as it ought to have been reduced to writing, but also the substance of the written agreement itself. And the party alleging a mistake holds the affirmative, and must satisfy the Court, beyond all reasonable doubt, that the alleged agreement was made, and that a mistake has occurred in reducing it to writing.¹

40. A mistake in a written instrument may be shown by parol proof.² And this, as well on the part of the plaintiff who seeks relief or a reformation of the writing, and to have it afterwards enforced, as on the part of a defendant who resists its performance.³ So, though denied in the answer.⁴ But not of a mistake *in law*.⁵

41. Evidence offered in equity to reform a deed need not be *positive*, in the strictest sense of that term;⁶ but it must be clear, strong, and satisfactory.⁷ Thus, it seems, mere confessions are insufficient.⁸

¹ Coles v. Brown, 10 Paige, 526.

² Rosevelt v. Fulton, 2 Cow. 129 ;
Beard v. Hubble, 9 Gill, 420.

³ Bellows v. Stone, 14 N. H. 175.

⁴ Gillespie v. Moon, 2 Johns. Ch. 585.

⁵ Wheaton v. Wheaton, 9 Conn. 96.

⁶ Greer v. Caldwell, 14 Geo. 207 ;

Goodell v. Field, 15 Verm. 576.

⁷ Beard v. Hubble, 9 Gill, 420 ; Leas

v. Eidson, 9 Gratt. 277.

⁸ Gillespie v. Moon, 2 Johns. Ch. 585.

CHAPTER XIX.

GROUNDS OF AVOIDING A SALE.—FRAUD.

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| 1. Misrepresentation avoids a sale.
3. Whether made ignorantly or intentionally; express or implied.
10. Under what circumstances the vendee is bound by a fraudulent sale; waiver; mode of rescinding; acceptance of deed; lapse of time, &c. | 21. Part-performance and compensation.
28. Parties; principal and agent, &c.
34. Fraud of the vendee.
41. Evidence, damages, &c. |
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1. It has been seen that even *mistake* may wholly or partially avoid a sale and purchase of real property. We proceed now to consider the somewhat analogous subject of *fraud*; consisting either in positive misrepresentation, or wilful concealment; or in circumstances of personal incapacity, or terms and conditions of sale, from which a fraudulent purpose may be inferred. In the first place, actual *misrepresentation* of the seller avoids the sale. Thus, misrepresentation, though in a slight degree, is an objection to a specific performance.¹ As, for example, misrepresentation of the value of an estate.² So articles may be set aside for fraud and imposition.³ So a vendor cannot maintain a bill for specific performance of a sale at auction, where the vendee was induced to purchase by his fraudulent contrivance and management.⁴ So Equity will rescind a sale at the request of the vendee, and restore the purchase-money, in case of false representations by the vendor, relative to his title; and the whole conduct of the vendor may be inquired into relative to the matter.⁵ So specific performance was

¹ Cadman v. Horner, 18 Ves. 10.

² Wall v. Stubbs, 1 Madd. 80.

³ Baugh v. Price, 1 Wils. 320.

⁴ Rodman v. Zilley, 1 Saxt. 320.

⁵ Smith v. Robertson, 23 Ala. 312.

refused, even on the ground of representations made at the sale by the vendor, of improvements, affecting the value of the premises, intended by him, which were not carried into effect.¹

2. But it has been held, that it is not every representation of the vendor in regard to property sold, that will amount to fraud, be it ever so exceptionable in point of morals.² So also, that, to avoid a contract for misrepresentation, it must be shown that the other party intended a deception, and was successful therein, to the damage of the party defrauded.³ Thus specific performance was decreed against a purchaser, where the representation in the particulars of sale, (complained of as calculated to mislead,) was so vague and indefinite, that it ought to have put the purchaser on previous inquiry.⁴

3. The doctrine, however, seems to be now well established, that actual misrepresentation avoids the sale, even though made through ignorance of the seller himself. It is said, a seller is bound to act with the utmost good faith, and, if he mislead the purchaser by a false *or mistaken* statement as to any one essential circumstance, the sale is voidable.⁵ So the general principle may be gathered from the authorities, that, if a party innocently and by mistake misrepresent a material fact, affecting the value of the property, upon which another party is ignorantly induced to act, it is as conclusive a ground for relief in equity as a wilful and false assertion.⁶ So it is said, any person undertaking to describe is bound by the description, whether conscious or not.⁷ Whether with a fraudulent design or innocently, yet, if a false impression has been conveyed and made the basis of a

¹ *Beaumont v. Dukes*, Jac. Ch. 422.

² *Yeates v. Prior*, 6 Eng. 58.

³ *Pratt v. Philbrook*, 33 Maine, 17.

⁴ *Trower v. Newcome*, 3 Mer. 704.

⁵ *Doggett v. Emerson*, 3 Story, R. 659.

⁶ *Waters v. Mattingly*, 1 Bibb, 244;
Shackleford v. Handley, 1 A. K. Marsh.

370; *Bibb v. Poather, &c.* Pr. Dec. 153;

Pile v. Shannon, Hard. 55; *McFerrin*

v. Taylor, 3 Cranch, 270; *Woods v.*

Hall, 1 Dev. Eq. 411; *Smith v. Bab-*

cock, 2 Woodb. & M. 216; *Hough v.*

Richardson, 3 Story, 659; *Lewis v.*

McLemore, 10 Yerg. 206. See *Duck-*

enfield v. Whichcott, Cha. Cas. Pt. 2, 24.

⁷ *Calverley v. Williams*, 1 Ves. 211.

contract, the extraordinary jurisdiction of the Court will not be exercised, by coercing a specific performance.¹ A misrepresentation in a matter of substance, affecting the value of the estate, is a good defence to a suit for specific performance, although the vendor, as well as the vendee, was ignorant of its untruth. As in case of an erroneous statement, that land in a distant State was situated in a particular county, in which the purchaser desired to buy.² So, where a purchaser buys on faith of a false representation by the seller touching the essence of the contract, the sale will be set aside in equity, whether the misrepresentation were the result of fraud or mistake.³ So, although equity will not rescind a sale, on account of a defect in the title, when a conveyance has been executed and accepted, and there is no fraud or misrepresentation; yet where there is a misrepresentation of a material fact, which was believed and acted upon, it is immaterial, in the view of a Court of Equity, whether or not the party making the statement knew it to be false.⁴ So a trustee was charged in respect of a misrepresentation to a purchaser; he having notice, and alleging only that he did not recollect the fact.⁵

4. The commissioners of a town, in selling the lots, in good faith, but untruly, represented, "that there was along the whole extent of the town a first-rate steamboat landing *all seasons of the year*; that the landing was one of the safest and best on the Mississippi; that on the west side of the river, immediately opposite the town, there was more elevated ground than was to be found on that side of the river, and that the nearest and best road could be made from that point to Little Rock." Held, the representations were material, and the purchasers, having bought under a supposition that they were true, were entitled to relief.⁶

5. Bill, originally brought in New York, to rescind a con-

¹ Gurley v. Hiteshne, 5 Gill, 217; Young v. Frost, 5 Gill, 287, 313; Chit. 659.

on Contr. 302, n.

² Best v. Stow, 2 Sandf. 298.

³ Doggett v. Emerson, 3 Story, R.

⁴ Lanier v. Hill, 25 Ala. 554.

⁵ Burrowes v. Locke, 10 Ves. 470.

⁶ Lewis v. McLemore, 10 Yerg. 206.

tract for the purchase and sale of land in Virginia, on which there was a gold mine, alleging fraudulent misrepresentations as to the mine, and other arts of the seller, by which the purchaser was induced to buy. Decree for the plaintiff. In this case, (a leading one upon the subject,) the Supreme Court of the United States remarked, in substance, as follows: It is an ancient and well-established principle, that whenever *suppressio veri* or *suggestio falsi* occurs, and more especially both together, they afford sufficient ground to set aside any release or conveyance. The party selling property must be presumed to know whether the representation which he makes of it is true or false. If he knows it to be false, that is fraud of the most positive kind; but if he does not know it, then it can only be from gross negligence; and, in contemplation of a Court of Equity, a representation founded on a mistake resulting from such negligence is fraud. The purchaser confides in it upon the assumption that the owner knows his own property, and truly represents it. And it is immaterial to the purchaser whether the misrepresentation proceeded from mistake or fraud. The injury to him is the same, whatever may have been the motives of the seller. The misrepresentations of the seller of property, to authorize the rescinding a contract of sale by a Court of Equity, must be of something material, constituting an inducement or motive to purchase; and by which he has been misled to his injury. It must be in something in which the one party places a known trust and confidence in the other. Whenever a sale is made of property not present, but at a remote distance, which the seller knows the purchaser has not seen, but which he buys upon the representation of the seller, relying on its truth, then the representation in effect amounts to a warranty; at least the seller is bound to make good the representation.¹

6. Any apparent discrepancy in the authorities upon this subject may be to some extent reconciled by the considera-

¹ Smith v. Richards, 13 Pet. 26.

tion, that, although the law does not make the vendor responsible for every unauthorized, erroneous, or false representation made to the vendee, even though it may have been injurious, unless also fraudulent; yet, where one has made a representation positively, or professing to speak as of his own knowledge, without having any knowledge on the subject, the intentional falsehood is disclosed, and the intention to deceive is also inferred.¹ (a)

7. Upon the ground above stated, it has been held, that on a bill filed by a vendee for rescission of the contract, alleging a fraudulent misrepresentation of a material fact by the vendor; if the evidence shows an honest mistake only, the intent being immaterial, the variance is not fatal, and relief will be granted.²

8. Where, in a treaty for the sale of property, the vendor makes material misrepresentations, even though through mistake, by which the purchaser, having no knowledge or means of knowledge in relation thereto, is actually deceived to his injury, equity will rescind the contract, although it do not itself contain the misrepresentations.³ So, misrepresentations on a *plat* of lands, produced at the time and place of a public sale, are good grounds for rescission. As where a fine stream of water was laid down, with a good mill-seat on it, in the centre of a tract of timber land, fit only for lumber; and which, upon examination, turned out to be only a dry gully three fourths of the year, without any running water in it. And such misrepresentation may be given in evidence against a bond given for the consideration-money,

¹ *Hammatt v. Emerson*, 27 Maine, 308.

³ *Hough v. Richardson*, 3 Story, R. 659.

² *Lanier v. Hill*, 25 Ala. 554.

(a) It has been held, however, that an agreement, containing a guaranty, that there is a certain quantity of timber upon a tract of land, does not necessarily include the idea, or authorize the inference, that the person making it knows the fact to be, as the guaranty stipulates that it shall be, for the foundation upon which business is to be transacted. *Hammatt v. Emerson*, 27 Maine, 308.

by way of discount, under the terms of a *discount* act, in a Court of Common Law.¹

9. Upon similar grounds, a *compromise* of rights, doubtful in point of law, but founded upon a misrepresentation or suppression of facts in the knowledge of one of the parties only, cannot be supported. Therefore a deed of compromise, induced by the opinion of counsel, upon a case laid before him, which was prepared by the defendant's agent, but mistaking the tenures under which the estates, the subject of the compromise, were held, was set aside.² So, where one having a clear title to £12 for rent, and claiming the property of the land, is induced, by the representations of two professional persons, that he had no right to either rent or land, to agree to accept £10 in full for rent and land; the Court will not entertain a bill for specific performance.³ So, if one having the fee-simple be induced by fraud to accept a chattel interest, equity will control the setting up of the lease.⁴

10. The important qualification to the general doctrine upon this subject requires to be stated, that Chancery will grant relief, where the vendor of real estate, by false and fraudulent representations respecting its quality, induces another to purchase it, if the purchaser is not in a situation to discern the defect by ordinary diligence, provided there is no adequate remedy at law.⁵ But where a purchaser relies upon his own judgment, uninfluenced by any misrepresentations, and has full means of knowledge within his reach, equity will not relieve him.⁶ So, to authorize a vendee to refuse to comply with the terms of sale, on account of a misrepresentation made by the vendor, the misrepresentation must be in a matter important to the purchaser's interest, by which he is actually misled. And if he knows

¹ The State v. Gaillard, 2 Bay, 11.

² Leonard v. Leonard, 2 Ball & Beatt. 171.

³ Stanley v. Robinson, 1 Russ. & Myl. 527.

⁴ Saunders v. Annesley, 2 Scho. & Lef. 101.

⁵ Sherwood v. Salmon, 5 Day, 439.

⁶ Hough v. Richardson, 3 Story, R. 659.

the representation is false, it cannot be said to influence his conduct, and he has no right to complain of any one but himself.¹ So a sale, though founded on the misrepresentations of the seller, cannot be for that cause wholly rescinded, if, prior to the completion of the sale, the purchaser had become acquainted with the whole facts, and yet confirmed the bargain.² So the misrepresentation, to affect the validity of the contract, must relate to some matter of inducement to the making of it, in which, from the relative position of the parties, and their means of information, the one must necessarily be presumed to act on the faith and trust which he reposes in the representations of the other, on account of his superior information and knowledge in regard to the subject of the contract.³ Thus, where the parties are present at the property sold, the assertions of the vendor as to its value and prospective profits, where there is no misrepresentation of facts, afford no ground for setting aside the contract.⁴ So the parties to a sale went upon the land, saw the location of the various parcels, and had plats of the land before them, but the vendor represented that one parcel was situated within certain lines of a survey, which was not so situated. Held, that the question, whether that representation was fraudulent or not, should be left to the jury, and that the vendor must use means which would impose upon a person of ordinary prudence, to constitute fraud, and the vendee must place confidence therein and receive damage.⁵ So it is held, that, in a case of alleged misrepresentation of value, there cannot be a more effectual bar to the plaintiff, than by showing that he was from the beginning cognizant of all the matters complained of, or, after full information of them, continued to deal with the property.⁶ So, where a vendee, with notice of the vendor's violation of, or inability to comply with, the contract, negotiates or further

¹ *Ely v. Stewart*, 2 Md. 408.

² *Pratt v. Philbrook*, 33 Maine, 17.

³ *Yeates v. Prior*, 6 Eng. 58.

⁴ *Hutchinson v. Brown*, 1 Clarke, 408.

⁵ *Griffith v. Eby*, 12 Mis. 517.

⁶ *Vigers v. Pike*, 8 Cla. & Fin. 650, 651.

contracts with him, he cannot afterwards abandon the purchase for any cause then known to him.¹ So, where A. gave a certificate that certain lands, which he had "partially explored," contained, "as far as my knowledge extends," a certain average of timber, and it appeared that the purchasers, to whom it was given, had as full means of knowledge as A.; held, they were not entitled to place implicit reliance thereon and make it the basis of their contract, but should have investigated the grounds of the opinion, and the extent of the exploration.²

11. A. sold to B., who was just moving into the State, a tract of land on the bank of the Mississippi, representing it to be above overflow; and also representing, that there were public lands back and adjacent to it, subject to entry with donation claims, held by B., which were likewise above overflow, when, in fact, a larger portion of both the front and back lands were subject to ordinary overflow. Held, such misrepresentations were fraudulent, and constituted sufficient grounds for rescinding the contract; but, B. having had an opportunity of ascertaining the true character of the lands, in a short time after making the contract, and having failed for some two years, of his determination to abandon the purchase, that he waived the fraud and confirmed the contract.³

12. Where a purchaser of shares in a mine had not relied upon the representations of the vendor as to the value of the mine, but had himself inspected it; held, as there was no proof that the representations made by the defendants were untrue assertions, which, if taken as true, would have added to the value, nor that these representations were not merely conjectural, the plaintiff was not entitled to relief in equity, but that his bill must be dismissed, without prejudice to any action he might be advised to bring.⁴

13. A. agreed with P., in consideration of £165,000, to

¹ *Griggs v. Woodruff*, 14 Ala. 9.

³ *Yeates v. Prior*, 6 Eng. 58.

² *Hough v. Richardson*, 3 Story, R. 657.

⁴ *Jennings v. Broughton*, 27 Eng. L. & Eq. 397.

grant to P. a lease of certain mines, as trustee for a joint-stock company, which P. undertook to form; the consideration to be paid partly in shares in the company, partly in money to be raised by calls on the remaining shares. The lease was afterwards executed; and the company, having been formed, with power to sue and be sued by one of the directors, entered into possession and worked the mines, and paid part of the purchase-money. Upon A.'s death, P., his executor, filed a bill against V., then managing director of the company, for an account and payment of what remained due to A. of the purchase-money. V. answered, and then filed a cross-bill on behalf of the company, setting forth various matters as evidence of misrepresentations, concealment, and other frauds practised by A. and P. on the company, and prayed that the consideration might be declared exorbitant and fraudulent, and that the company was entitled to a valid lease of the mines at their true reduced value; or that the agreement might be declared fraudulent and void, and the company discharged therefrom, and entitled to a lien on A.'s estates for the payments made to him. Held, 1st. That the company were not entitled to any relief from the agreement, by reason of acts and misrepresentations which proceeded from themselves, or were adopted by them and acquiesced in after full knowledge, while they continued to work and exhaust the mines. 2d. That as the executed contract was not to be set aside, A.'s executor was entitled, as matter of course, to the account and payment prayed by his bill.¹

14. But where a purchaser of timber land seeks to rescind the contract for fraud, on the ground of falsehood as to the quantity of timber on the township; although he makes an examination of the land before the purchase; still, if he confides as to the details in the false statements of the person negotiating with him, and his agents, he is not precluded from rescinding the sale; more especially if there was false-

¹ *Vigers v. Pike*, 8 Clark & Fin. 562.

hood as to other material matters in the trade, not offered to be examined.¹

15. A sale procured by fraud and misrepresentation of the vendee is not absolutely void, but only voidable, at the option of the vendor; which must be exercised as soon as the fraud is discovered, or in reasonable time thereafter. If he would rescind the contract, he must restore, or offer to restore, whatever he has received under it, in substantially the same condition in which it was received; he cannot rescind in part and affirm as to the residue. Producing at the trial, and offering to cancel, the notes received in part payment of the purchase-money, is not sufficient.² A deed of quitclaim, made six months after the purchase, was held within a reasonable time; it not appearing that the fraud was sooner discovered. So where such a deed was left with the clerk of the Court, in which an action on the note given for the estate was pending, with notice to the vendor; held, a sufficient restoration of the property.³ So where the vendee, in an executory contract for the sale of land, goes into and remains in possession, he does not thereby waive objection to the title; other circumstances must exist, such as to show that he knew of its defects, and intended to accept such title as could be made, relying, in case of its failure, upon the covenants of warranty, for redress.⁴

16. Although, in general, a parol contract is merged in the deed by which such contract is perfected, yet an action for fraud in the sale of lands will lie against the grantor and others, notwithstanding the covenants of seizin in the deed.⁵ So, although the acceptance of a deed, in pursuance of articles of agreement, is *primâ facie* and generally an extinguishment of the agreement; yet, if the vendor fraudulently induce the vendee to accept a deed, by making him believe

¹ Tnithill v. Babcock, 2 Woodb. & M. 298.

² The Matcawan, &c. v. Bentley, 12 Barb. 641.

³ Concord Bank v. Gregg, 14 N. H. 331.

⁴ Jones v. Taylor, 7 Texas. 240.

⁵ Bostwick v. Lewis, 1 Day, 33, 250; Norton v. Hathaway, Ib. 255.

that the whole of the land contracted for is included in it, the agreement is not merged, and the vendee may maintain an action upon it. So, although he has paid the full amount of the consideration-money to the vendor. So he may maintain assumpsit for non-performance of the contract, and is not obliged to bring an action for deceit; nor would an action of covenant be proper.¹

17. It has been seen in previous chapters, that a *partial* loss of the property purchased, or failure of title thereto, arising merely from *mistake*, does not generally furnish ground for rescinding the sale, but only for compensation. A different rule prevails, however, in case of *fraud*; it being well established, that a party obtaining an agreement by a partial misrepresentation is not entitled to specific performance, on waiving the part affected by such misrepresentation. The effect is, not to alter or modify the agreement *pro tanto*, but to destroy it entirely, and to operate as a personal bar to the party who has practised it.² Thus the maxim, *caveat emptor*, is not to be applied, so as to protect the vendor in knowingly defrauding the vendee, as to the quantity of the land sold.³ So, even where a party has been induced to purchase land by the *unintentional* misrepresentations of the seller as to the quantity included within the boundaries, the deficiency being material, equity will rescind the contract; and this, though the complaint seeks relief upon the ground that the representations were fraudulently made, if the answer admits a mistake as to the quantity.⁴ So where the quantity of land is fraudulently misrepresented by the vendor, the contract is not obligatory on the vendee, though the land be sold in gross or by certain boundaries; and, in an action to rescind the contract, it is error to reject evidence of the actual quantity of the land; the deficiency in quantity being the basis of the right to introduce evidence

¹ Lee v. Dean, 3 Whart. 316.

² Clermont v. Tasburgh, 1 Jac. & Walk. 112.

³ Pringle v. Samuel, 1 Litt. 44.

⁴ Belknap v. Sealey, 2 Duer, 570.

touching the representations of the defendant, concerning the quantity of land, and such other circumstances as tended to give character to the transaction.¹ And the fact that the deficiency was small is no bar to relief, if it bears a considerable proportion to the whole tract.²

18. Purchase of land on the representation that it was only overflowed from the backwater of a certain bayou. It was proved that it did overflow generally, that the owner knew it, and that it diminished its value. Held, a fraud, and the contract was rescinded.³ So a sale of the fixtures and fittings of a public-house was held to be avoided, by a false representation of the vendor as to the amount of business attached to the house, though the agreement expressly excluded the *good will*.⁴ So a misrepresentation by a vendor of a saltpetre cave of the quantity of saltpetre, which a given quantity of nitrous earth will produce, authorizes a rescission of the contract; even though the purchaser employed a person in whom he had confidence, to examine the cave for him after the representation was made, and he made a favorable report.⁵

19. The plaintiff purchased of the defendant a tract of land on the Ohio River, the latter representing and believing that it contained a valuable coal mine; and, besides paying \$4,400, covenanted for an annuity of \$1,000 for 20 years; which was to cease if, after the mine was faithfully worked, it should not yield a certain quantity of coal. The land was accordingly conveyed, but proved not to contain such a coal mine, as was represented. A perpetual injunction was granted to restrain the defendant from prosecuting at law for the annuity. It was also held, that, as there was no such coal mine in the land as was represented, the plaintiff need not work the mine in order to discover the quantity of coal.⁶

20. So a misrepresentation by the vendor of an *occult*

¹ Hatch v. Garza, 7 Texas, 60.

² Pringle v. Samuel, 1 Litt. 44.

³ Alexander v. Beresford, 27 Miss.

⁴ Hutchinson v. Morley, 7 Scott, 341.

⁵ Perkins v. Rice, Litt. Sel. Cas. 218.

⁶ Rosevelt v. Fulton, 2 Cow. 129.

quality in the land, although made ignorantly, and although the vendee agrees to run the risk in this respect, has been held to bar an action for specific performance.¹

21. But, on the other hand, when a misrepresentation as to the quantity of land agreed to be conveyed is made, though innocently, it is the *right* of the purchaser, if he does not abandon the contract, to have what the vendor can convey, with an abatement of a proportionate amount of the purchase-money.² So, where an agent of a vendor, by misrepresenting a material fact, of which the vendee had not the means of obtaining correct information, induced the vendee to make the purchase; in an action against the vendee, on the articles of agreement, which had been in part complied with on his part, it was held, that he was entitled to have deducted, from the sum claimed in the action, the difference between the value of what he received and what he thought he was purchasing.³ So, whenever it appears that the vendor's own title-deeds must have disclosed to him the true quantity of land, he is bound to make compensation for a deficiency, though his deed to the vendee express a quantity "more or less."⁴

22. But it is doubted, whether a bill filed for compensation singly, without other relief, can be maintained, for the difference between the value of an estate sold and conveyed and the purchase-money paid, on the ground of fraud. The jurisdiction of equity in cases of compensation is said to be only *incidental* and *ancillary* to that of giving relief, by enforcing the performance of contracts for the sale of real property. The remedy in such cases is at law, by an action for damages.⁵

23. With regard to the *party* who is responsible for a fraudulent representation in the sale of land; it is held that, upon a proceeding in equity to set aside such sale, the person most benefited by it is in a situation to be suspected of

¹ Fisher v. Worrall, 5 W. & S. 478.

² Walling v. Kinnard, 10 Tex. 508.

³ Pennock v. Tilford, 17 Penn. 456.

⁴ Duvals v. Ross, 2 Munf. 290.

⁵ Newham v. May, 13 Price, 749.

the fraud. Therefore, if such a person makes false statements as to material matters connected with the value of the land, and which, from being more within his private knowledge, or other circumstances, were clearly relied on in the purchase, the sale is void, whether he believes them to be true or not. And, in a bill against such party and another, it is no objection to rescinding the contract, that another remedy on a guaranty may exist against the person alone, now become insolvent, but not against the other respondent; or that the complainant had an opportunity to examine the land, and one of his friends did examine it, some time before the bargain was completed; if the false representations were relied on as to details, and others, hired by him unknown to the examiner, were uniting in statements and acts likely to mislead; and more especially if the misrepresentations extended also to other matters than the timber on the land, which were material, and were not attempted nor offered to be examined.¹

24. The vendor is responsible for the misrepresentation of *his authorized agent*. Thus the purchase of an estate was rescinded at the suit of the purchaser, on the ground of fraudulent misrepresentation; the contract having been completed with the knowledge, on the part of the defendant, *or her agent*, of a public right of way over the property, and the plaintiff not knowing, nor having the means of knowing that fact.²

25. Defendant, being owner of a house, employed an agent to sell it. The agent described it as free from rates and taxes, and did not know it to be otherwise; but it was in fact liable to certain rates and taxes, as the defendant knew. On the faith of the agent's description, the plaintiff bought the house. Held, the plaintiff might maintain an action on the case for deceit against the defendant; though

¹ Smith v. Babcock, 2 Woodb. & M. 216.

² Gibson v. D'Este, 2 You. & Coll. C. C. 542.

it did not appear that the defendant had instructed the agent to make any representation as to rates or taxes.¹

26. A. and B. gave a bond to C., conditioned to convey certain timber land, provided C. should elect to buy the same on certain terms within thirty days, or make sale thereof within the same time; in which case, only one half of the excess over a certain price was to be paid to A. and B. C. did make sale of the land, and A. and B. received one half of the excess of the price over the stated sum, and made a deed thereof to the purchaser. Held, C. was the agent of A. and B. in the sale, and they were bound by his representations.²

27. Where a sale made by an agent is ratified by his principals, his representations, made at the time of the sale, bind them. Thus, a paper was executed by A. as agent of the defendant to D., giving D. the refusal of certain timber lands for a certain time at a certain price. D. subsequently sold the land to the plaintiff, and the deed was made by A. The plaintiff brings an action against A. and his principals, to set aside the sale, on account of fraudulent misrepresentations by D. Held, the circumstances created a legal presumption that D. was acting as agent of A. and his principals, and that, as A., by his conduct, subsequently ratified the sale, he and his principals were responsible for all D.'s misrepresentations made at the sale, whether D. exceeded his authority or not, inasmuch as they could not ratify a portion of the transaction and reject the rest.³

28. If a sub-agent receives from the vendee a part of the purchase-money, and pays it over to the principal, taking land instead of it for his compensation, the principal is liable (on a rescission of the purchase for fraud) to repay that part, as well as what he received directly.⁴ (a)

¹ Fuller v. Wilson, 3 Ad. & Ell. N. S. 68.

³ Doggett v. Emerson, 3 Story, R. 659.

² Hough v. Richardson, 3 Story, R. 659.

⁴ Doggett v. Emerson, 1 Woodb. & M. 195, 206.

(a) The following recent case, founded equally upon mutual mistake and

29. A sale of lands may be avoided for the misrepresentation of the vendee as well as the vendor. Thus, if A. articles for the purchase of B.'s estate, pretending he bought it for one, whom B. was desirous to oblige, but in truth bought it for another, and by that means got the estate at an under-value; equity will not decree an execution of these articles.¹ (a)

¹ Phillips v. Bucks, 1 Vern. 227.

actual misrepresentation on the part of the vendor, and at the same time involving the mutual rights and obligations of principal and agent, may properly be cited in this connection.

A contract was made by certain parties, that one should sell and the other purchase a tract of timber land in Maine, and if, upon an exploration, it did not contain sixty millions of pine timber, and there was not a stream running through it, which would, with an ordinary freshet, carry logs from the tract to the Kennebec River, without difficulty, the agreement should be void. The parties procured an exploration, and, upon a favorable report of their agent, purchased the tract, taking a deed, and making the stipulated payments. It subsequently appeared that there was a gross mistake in the estimation of the quantity of timber, that the exploration was not made entirely upon the tract in question, but partly upon an adjacent one, and that the pine timber did not exceed *five millions*. Upon a bill in equity, brought by one of the purchasers to rescind the contract, and praying for general relief: Held, 1. That the original contract must be set aside, as founded in gross mistake. 2. That the conveyance to the plaintiff must be rescinded, and the purchase-money restored. 3. That the agent of the owners, who had effected the sale in his own name, having received the purchase-money, was primarily liable to repay it; and in his aid, those of the other defendants for whom he had acted as agent, and who had received any part thereof, with a full knowledge of all the circumstances, must repay the proportions thereof respectively received by them.

A mutual agreement having been made between the defendants, upon the division among them of the notes taken for the purchase-money, according to their respective interests, that they would bear their respective proportions of any losses which might arise from inability of the purchasers to pay the same; held, the plaintiff could not, in equity, have any benefit from this agreement, in case he was not able, from the parties directly liable to him, to obtain back the purchase-money decreed to him. *Daniel v. Mitchell*, 1 Story, R. 172.

(a) But if A. in contracting with B. falsely represents himself to be the agent of C., and thereby obtains better terms, the Court will, notwithstanding

30. Declaration upon a written agreement, by which the plaintiff agreed to purchase of the defendant his unexpired term in a farm, and all the crops, &c., alleging that the defendant had not delivered up possession. One of the pleas was, that the defendant in his lease covenanted with the lessor not to assign without his consent; that the defendant, being desirous of parting with the farm, applied to the agent of the lessor, who stated that, if he could find a successor eligible as tenant, in the landlord's opinion, after they had had an opportunity of inquiring and a reference, there would be no obstacle; that the agreement was made for the purpose of J. M. becoming occupier of the farm, and the defendant was induced by the plaintiff and J. M. to enter into the agreement, on the faith and belief that the plaintiff knew, and the plaintiff, to induce the defendant to enter into it, represented, that J. M. was a person of respectability, and eligible, &c., and could give references; whereas J. M. was not a person of respectability, and could not give references, &c., as the plaintiff well knew. Held, a good, though informal, plea of fraud; and that the representation was material to the agreement, and not collateral.¹

31. Where the vendee applied to the vendor to purchase a lot of wild land, and represented to him that it was worth nothing except for the purposes of a sheep pasture, when he knew there was a valuable mine on the lot, of the existence of which the vendor was ignorant; held, a fraud, which would avoid the purchase.²

¹ *Feret v. Hill*, 6 Eng. Rep. 261. See ² *Livingston v. Peru, &c.* 2 Paige, Canham v. Barry, 29 Eng. Law & Eq. 390.
290.

ing, enforce the contract, unless A. knew that such would be the effect of the misrepresentation. *Fellowes v. Lord Gwydyr*, 1 Sim. 63. A purchase of lands from an executor, at a discount of eighteen per cent., the purchaser knowing that the condition of the estate did not require the sale, is a fraud in him, though he may know that they do not amount to more than the executor's interest in the estate; and, the executor not having paid to the other legatees their portion of the estate, the purchaser will be compelled to repay the money to them. *Pinckard v. Woods*, 8 Gratt. 140.

32. An order, giving a party authority to sell and convey land, fraudulently obtained from a Court, is no better than a power fraudulently derived from the party whose rights are injuriously affected by it. It may always be annulled, and all proceedings under it may be set aside, at his instance, upon establishing the fraud, at least as to all persons who were parties or privies to such fraud.¹

33. But if the purchaser of land at a sheriff's sale was innocent, it is immaterial whether there was, or not, fraud on the part of others.²

34. With regard to the *remedy*, in case of misrepresentation by a vendor of real estate; it has been sometimes held, (though such can hardly be considered as the established doctrine,) that no action lies against the vendor of real estate, for false and fraudulent representations respecting its quality and situation.³ So also, that damages cannot be recovered for *the loss of a good bargain*, and that an action will not lie for a deceit, in an executory contract respecting the sale of lands, unless perhaps in the false affirmation of title.⁴

35. But the weight of authority is, that, where representations are made of the nature and character of property offered for sale, affecting its value, which turn out to be false to the knowledge of the party making them; an action at law lies for damages for the deceit, and a suit in equity to set aside the contract.⁵ Thus a vendor, misrepresenting the state of the title, will be restrained from enforcing it, though the sale be with general warranty.⁶ So the vendee may go into equity for relief, although there has been no eviction.⁷ So a partial failure of consideration for a note given in payment for land sold, not arising out of failure of title, but out of fraudulent misrepresentations respecting the

¹ Clark v. Underwood, 17 Barb. 202.

² Spindler v. Atkinson, 3 Md. 409.

³ Sherwood v. Salmon, 2 Day, 128.

⁴ Fagan v. Newson, 1 Devereux, 20.

⁵ Attwood v. Small, 6 Cl. & Fin. 395.

⁶ Shackelford v. Handley, 1 A. K. Mar. 370.

⁷ English v. Benedict, 25 Miss. 167.

quantity of timber, may be given in evidence in defence in a suit upon such note, while it remains in the hands of the seller, or in the hands of one having no superior rights. And the buyer may make such defence, though he contracted to sell a portion of the land, and gives the seller in part payment a note signed by the second vendee as principal, and himself as surety.¹

36. With regard to the proper *evidence* of fraud, in contracts for the sale and purchase of lands, it has already been stated, that a written contract must be expounded by itself, and cannot be diminished or added to by *parol evidence*, except under an allegation of fraud or mistake.²

37. And this exception has been strictly construed. Thus parol evidence is inadmissible, that one of the parties to the agreement represented, that such agreement would give to the other party what the agreement distinctly declared he should not have; the agreement itself being the best evidence of what the parties intended should be the final and binding contract between them, and nothing being shown to have been left out of the agreement by fraud or mistake.³ So parol evidence is inadmissible, that a contract for the sale of land was agreed to be put in writing, but the vendor fraudulently refused to do so.⁴

38. But misrepresentation and fraud may always be shown by parol evidence. Thus the defendant, in a suit for specific performance, may show in his defence by parol evidence, that the written contract relied upon does not correctly and truly express the agreement of the parties, but that there is some material omission, insertion, or variation, through mistake, surprise, or fraud.⁵ So where, in a treaty for the sale of property, the vendor makes material misrepresentations, by which the purchaser, having no knowledge or means of knowledge in relation thereto, is actually deceived

¹ Hammatt v. Emerson, 27 Maine, 308.

² Blanchard v. Moore, 4 J. J. Marsh. 471; Wesley v. Thomas, 6 Harr. &

John. 24; Watkins v. Stockett, 6 Harr. & John. 435.

³ Jarvis v. Palmer, 11 Paige, 650.

⁴ Box v. Stanford, 13 Sm. & M. 93.

⁵ Best v. Stow, 2 Sandf. 298, 300.

to his injury; equity will rescind the contract, although it do not itself contain the misrepresentations; and whether they be the result of mistake or fraud.¹ So parol evidence has been held admissible, by way of defence, of a warranty made by the vendor at the time the deed was executed, that he had a good title to a certain number of acres.²

39. So, where circumstances denote fraud in omitting to reduce part of an agreement into writing, the whole of it is open to parol proof. The Court disregards the writing, and treats the whole transaction as a verbal contract.

40. Bill filed by the lessee of premises, which he held under a church lease, against persons who had agreed in writing to purchase his lease. The complainant alleged, that an implied right of renewal entered into the purchase, and that the defendants were to take, subject to a burden upon a part of the premises, of a lease for a year, which had been granted by the complainant. The buyers omitted to insert these things in the written agreement, but verbally recognized them; and they managed to get a renewal in their own names, through the recommendation of the complainant; but declined, inasmuch as the old term had in the mean time expired, to make good their agreement with the latter, and proceeded to eject the tenant, who was to have held possession of a part for a year. Complainant prayed that the parties might pay their purchase-money, and perform their contract with him. A general demurrer was interposed, but overruled.³ So an action will lie against the seller of any interest in an estate, for affirming *the rents* to be more than they are, while he is in treaty about the sale, if the vendee purchases upon the faith of such affirmation; though the seller was not then in possession, and the affirmation preceded the sale.⁴ Thus, in an ancient case, the

¹ Hough v. Richardson, 3 Story, R. 659; Prentiss v. Russ, 4 Shepl. 30.

² Frederick v. Campbell, 13 Serg. & Rawle, 136; McLelland v. Creswell, Ib. 143. (But qu.)

³ Phyfe v. Wardell, 2 Edw. Ch. 47.

⁴ Lysney v. Selby, 2 Ld. Raym. 1118.

defendant, in an action for deceit, sold the plaintiff a messuage, which he affirmed was let for £42 per annum, the rent being actually only £32. Held, the action would lie, the case being not a mere affirmation of a *false value*, which is matter of judgment, but a *falsity in his own knowledge*. Neither is it the case of a *warranty in a thing apparent*; because the lease may be by parol, or the tenant unwilling to say what rent he paid.¹ So, where the vendor of a public-house made, pending the treaty, certain deceitful representations respecting the amount of business done in the house, and the rent received for a part of the premises, whereby the plaintiff was induced to give a large sum for them; held, the latter might maintain an action on the case for the deceitful representations, although they were not noticed in the conveyance, or in a written memorandum of the bargain, drawn up after these representations were made.² So where the defendant, being about to sell a public-house, falsely represented to B., who had agreed to purchase it, that the receipts were £180 a month; and B., with the knowledge of the defendant, communicated this representation to the plaintiff, who became the purchaser instead of B.; held, the plaintiff might maintain an action against the defendant.³

41. Parol evidence is inadmissible to reform a written contract, according to the intention of the parties, upon the ground of fraud, unless the declaration especially sets forth the fraud, as a ground for such reformation. But, to insist upon the legal effect of a written agreement, when an exception was not inserted, on the expressed understanding of the parties, that such accepted matter was not embraced in the agreement; is such a fraud as will admit parol testimony to reform the contract.⁴ (a)

¹ Ekins v. Tresham, Lev. Pt. 1, 102.

³ Pilmore v. Hood, 5 Bing. N. C. 97;

² Dobell v. Stevens, 3 Barn. & Cress. 623.

⁶ Scott, 827.

⁴ Renshaw v. Gans, 7 Barr, 117.

(a) In addition to the fraud, which consists of positive *misrepresentation*, —*suggestio falsi*—with regard to the property sold; it is sometimes held,

that mere negative *concealment*—*suppressio veri*—of facts known by one party and not known by the other, has the same effect of avoiding the sale. (See *Waters v. Mattingly*, 1 Bibb, 244; *Broderick v. Broderick*, 11 P. Wms. 240.) There is no point, however, connected with the sale of either real or personal property, which has been more prolific of discussion, or upon which the precise existing rule of law seems to be more unsettled. As has been already seen, even in case of actual misrepresentation, neither law nor equity affords aid and relief to a party who is not injured by such misrepresentation, but by his own negligence in trusting to it, with full knowledge or means of knowledge of the actual facts of the case. (See *Wason v. Waring*, 15 Eng. Law & Eq. 121.) And the same rule is still more decisively applicable to mere *concealment*; which indeed can hardly be said to exist in the case supposed, because, from a party having notice, nothing is truly concealed. The discussions upon the subject all presuppose knowledge in one party, and necessary ignorance in the other; and the confusion arises from the nice shades of distinction which run through the decided cases, and the elementary writers, as to the *moral* rights and duties of vendor or vendee under such circumstances;¹ and also from the conflicting doctrines of the *civil law* and the *common law*; *caveat venditor* being the cardinal maxim of the one, *caveat emptor* of the other. It may be useful, at the close of the present chapter, to refer to a few of the leading authorities, some of which have been already cited in other connections, upon the application of the latter maxim, generally, to sales of real property. (See *Met. Yelv.* 21, b.)

¹ It is said, (*Story on Sales*, § 174; see also 1 *Story*, Eq. §§ 204 *et. seq.*; 2 *Kent*, 481,) “concealment of a fact is never considered as fraudulent, unless there be a legal or equitable obligation on the part of the person concealing it to divulge it, growing out of some express or implied trust in the party concealing it. The omission to comply with a merely honorary or purely moral obligation, does not, of itself, furnish a sufficient ground to set aside a contract.” Obviously, however, this proposition, which may be called not merely a truth, but almost a truism, throws little light upon the real point of controversy; for it furnishes no test of the existence or non-existence of the “legal or equitable,” “merely honorary or purely moral obligation,” referred to.

A distinction is sometimes made between *intrinsic* and *extrinsic* circumstances, which affect the value of the property sold; the former appertaining to the nature, condition, character, quality, or quantity of the property itself; the latter to collateral facts: and the duty of disclosure held to be more binding with respect to the former than the latter. The distinction, however, does not seem sufficiently established by English and American authorities, however well settled in the civil law, to require further notice. It is also sometimes stated, that, while mere concealment may not give the right to annul an executed contract, by legal proceedings instituted on behalf of the party injured; still it may be set up in defence against a suit in law or equity, upon an executory agreement, brought by the party who has practised it.

Upon this subject, it has been truly said (Taylor v. Fleet, 4 Barb. 102,) that "the vendee must guard himself against the vendor's strong representations and commendations of the good qualities of the land sold, by personal examination and inquiry, unless such examination and inquiry are difficult or are prevented by the artifice of the vendor." This principle has been held to apply, where the vendor of a house represented it, as a residence fit for a respectable family; because the vendee might see the house and judge upon that point for himself. (Magennis v. Fallon, 2 Moll. 461.) So, where a house was sold, on the north side of the Thames, supposed to be in the County of Essex, but actually in Kent, a small part of which county was on the other side of the river; the purchaser was told he would be made a churchwarden of Greenwich, when his object was to be a freeholder of Essex; yet he was compelled to complete the purchase. (Shirley v. Davies, 6 Ves. 678. This, however, with some others of like import, has been called a *wild case*,—per Hart, L. C. 2 Moll. 588.) So the description of the land, as "uncommonly rich water meadow," was held to be the mere loose opinion of the auctioneer or vendor, upon which the purchaser could not be supposed to place any reliance. (Scott v. Hanson, 1 Sim. 13.) So, where a house without roof or windows is warranted to be in perfect repair; the warranty is said not to be binding. (Per Lord Rosslyn, Grant v. Munt, Coop. 173.) So, where C. gave a certificate that certain lands, which he had "partially explored," contained, "as far as my knowledge extends," a certain average of timber, and it appeared that the purchasers, to whom it was given, had as full means of knowledge as C.; it was held, that they were not entitled to place implicit reliance thereon, and make it the basis of their contract, but that they should have investigated the grounds of the opinion therein expressed, and the extent of the exploration by C. Hough v. Richardson, 3 Story, R. 659. But it is said, (1 Sugd. 445,) that, where a particular description is given of the estate, which turns out to be false, and the purchaser cannot be proved to have had a *distinct* knowledge of the actual state of the subject of the contract, he will be entitled to a compensation. Thus, where the particular described the house sold as in good repair, and the farm as consisting of arable and marsh land, in a high state of cultivation, it was held that these were points of which a purchaser might have an indistinct knowledge; but, if defects became apparent upon a subsequent, careful examination, he was entitled to be compensated.

In Harvey v. Young, (Yelv. 21, a.) the plaintiff brought an action for deceit in the sale of a term, which the vendor affirmed to be worth £150, but which proved to be worth only £100. A distinction was there taken between mere *affirmation* and warranty, but no decision seems to have been made. This distinction was afterwards overruled in Pasley v. Freeman, 3 T. R. 57. The true principle is stated to be, that, where an affirmation is a mere assertion, and the vendee may judge for himself, as in case of a mere

opinion, or where the truth may be known by common prudence, no action lies. *Yelv. (Met.) 21, a. n.*

The following cases relate more particularly to mere concealment.

Action by the purchaser against the vendor of a house, for selling him the house, knowing it had the *dry rot*. It appeared that the house was situated in a clayey soil, and that the floor lay near the ground, whereby some of the timbers had rotted; but that the vendor was not aware of these defects. Lord Kenyon denominated them mere *bagatelles*; and remarked, that, if these small circumstances were to be the foundation of an action, every house that was sold would produce an action. A broken pane of glass in a garret window would furnish ground for an action. His Lordship further remarked, that he had met with something of this kind, and he never thought himself imposed upon, because now and then some rotten boards and rotten joists might be found about a house. The plaintiff was nonsuited. *Boulds v. Atkinson*, 2 Sugd. 452.

Case for deceit. Declaration that the defendant, being lessee of certain premises, agreed to sell them to the plaintiff, who agreed to purchase them of her, for the residue of the term, and they were assigned to him accordingly; that, at the times, &c., the premises were held by a tenant of the defendant at the rent of £100 a year, but charged with £16 a year for rates and taxes, which the tenant paid, and was at liberty to deduct out of the rent; all of which the defendant knew, but the plaintiff did not, as the defendant also knew; that the defendant, at the times, &c., deceived the plaintiff, and fraudulently represented to him that the premises were let at £100 a year clear of taxes and rates, and concealed from him that the rent was subject to the said deductions; that the plaintiff was induced by the representations and conduct of the defendant to take the assignment; and that the defendant, by means of the premises, &c., deceived the plaintiff, and induced him to purchase, &c., at a larger sum than he otherwise would have paid. Plea, not guilty.

A special verdict stated, that the defendant knew of the above deductions, which were made by agreement from the rent; that she desired W., her attorney, to instruct the plaintiff, an auctioneer, to prepare particulars for sale of the premises, and referred W. for information to a person having a lien on the premises, who told W. that the rent was £100 a year; that W. asked no question about rates and taxes, assuming that the tenant paid them, as the practice was in London, where the premises were situate; that the defendant did not further interfere; that W., not knowing that the defendant paid the rates and taxes, instructed the plaintiff that the premises were held by a tenant at £100 a year, but never described them to him as clear of rates and taxes, or authorized him so to represent them; that the plaintiff drew up a particular for the sale, stating the premises to be let at £100 "clear of rates and taxes;" that W. saw the particular, but did not

correct it, because he thought it true, and W. thought it the plaintiff's duty to inquire into the outgoings, when he was employed to make the particular; that the premises were put up to sale and bought in, and the plaintiff then took them himself, and they were assigned to him; that neither W. nor the plaintiff knew of the agreement for a deduction from the rent, till after the assignment and payment of the purchase-money; and that, at the times of such assignment and payment, the plaintiff believed the premises to be let at £100 clear of rates and taxes. Held, on this finding, it did not appear that the defendant had been guilty of any actual fraudulent representation or concealment, or had authorized any; that if W., as her agent, had been thus guilty, she would herself have been liable; but that no such misfeasance by W. appeared by the verdict; and therefore the defendant was entitled to judgment. *Wilson v. Fuller*, 3 Ad. & Ell. N. S. 68.

But it is said, if a vendor should sell an estate, knowing he had no title, or that there were incumbrances unknown to the vendee, the sale would be voidable for fraud. So in case of the sale of a house in a distant town, which the vendor knew to be burnt down, the vendee being ignorant of it. 2 Story, Eq. 226-27, §§ 208-9; *Arnott v. Biscoe*, 1 Ves. 95; *Pillage v. Armitage*, 12 Ves. 78.

Bill for specific performance by a vendor. Defence, that he represented it as clearing a net value of £90 per annum, and gave no notice of the necessary repair of a wall to protect the estate from the Thames, which would be an outgoing of £50 per annum. Upon the ground that this fact had been industriously concealed, the bill was dismissed, but without costs. *Shirley v. Stratton*, 1 Bro. 440.

So where the vendor of a house, knowing a defect in a main wall, plastered it up and papered it over; held, he was liable to the purchaser. 4 Taun. 785.

Concealment may be practised by the vendee as well as the vendor. In such case it has been held, that, if one, knowing the existence of a mine upon the land of another who is ignorant of it, purchase the land for a price which the land would be worth without the mine; the vendor is still bound. *Fox v. Mackreth*, 2 Bro. 420. Although it has been doubted whether a Court of Equity would enforce specific performance in favor of the purchaser. 2 Kent, 490; *Parker v. Grant*, 1 Johns. Ch. 630. And Lord Eldon remarks, (*Turner v. Harvey*, Jac. 178.) that, although the vendee, in the case supposed, is not bound to give the information where no inquiry is made, still a very little will affect the application of the principle, and it will not be allowed to operate, if a single word is dropped tending to mislead the vendor. See *Pidcock v. Bishop*, 3 B. & C. 605.

CHAPTER XX.

IMPLIED OR CONSTRUCTIVE FRAUD.—INCAPACITY, INADEQUACY OF CONSIDERATION, ETC.

1. Constructive fraud.
2. Mental inability.
6. Drunkenness.

10. Inadequacy of consideration.
16. Excess of consideration.

1. A CONTRACT for the sale and purchase of real property may be avoided, not only by *actual* but by *constructive* fraud, consisting for the most part in the personal incapacity of one of the parties, or in some circumstance of the case, which renders it harsh or inequitable to enforce the contract. It will be seen, that this class of objections, though comprehending those which in name and form are various, has still a common character running through the whole, and requiring that they should be considered together. Thus *inadequacy of consideration* will often defeat the sale, when combined with some personal disability, although of itself it might not produce that result. And the same may be said of contracts made with *heirs*, or with those holding a *confidential* relation to the other contracting party. (Chaps. 21-2.) Constructive frauds are defined to be "such acts or contracts as, although not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and, therefore, are prohibited by law, as within the same reason and mischief as acts and contracts done *malo animo*."¹

¹ 1 Story, Eq. § 258.

2. With respect to *mental inability*, (a) as a ground for avoiding a sale or purchase of real estate, the law enumerates four classes of persons as *non compotes mentis*. 1, an idiot or natural fool; 2, one who was of good and sound memory, but by the visitation of God has lost it; 3, a lunatic, one who has lucid intervals, being sometimes of good and sound memory, sometimes not; 4, a *non compos* by his own act, such as a drunkard.¹

3. Mental incapacity must of course be *affirmatively* and *distinctly* proved, in order to avoid a sale. Thus, that the intellectual capacity of one of the parties to a contract is below that of the average of mankind, does not alone furnish sufficient ground for setting aside the contract.² So a contract is not invalid, if made by a man in the habit of buying and selling, and transacting his own business, merely because he was *illiterate*, unless he has been grossly deceived or fraudulently imposed on.³ But those, who from imbecility of mind are incapable of taking care of themselves, are under the special protection of the law; and a contract entered into by one of weak understanding, more especially if superinduced by undue influence or misrepresentation, will, upon application of the deceived party, be set aside by a Court of Equity.⁴ So a stipulation procured by one party from the other, while his mind was *incapable of rational volition*, either by reason of unsoundness, or of illegal and unjust constraint, ought to be dissolved by a Court of Equity, as wanting the assent of the party, unless ratified and confirmed while the mind was sound and free to act.⁵

4. A contract for the sale of land, made by one who had been adjudged *a lunatic*, is absolutely void, and no action

¹ Beverley's case, 4 Co. 124; Co. Lit. 247 a.

⁴ Craddock v. Cabiness, 1 Swan, 474.

² Mann v. Betterly, 21 Verm. 326.

⁵ Taylor v. Patrick, 1 Bibb, 168; Rutherford v. Ruff, 4 Desaus. 350.

³ Rodman v. Zilley, 1 Saxton (N. J.) Ch. 320.

(a) As to the ancient maxim of the law, that "no man shall be permitted to *stultify* himself," see 1 Pars. on Contr. 310, and note, and authorities.

can be maintained to enforce it; nor can the committee, to whom the care of his estate has been intrusted, by any act of his, make such a contract good.¹ But, although sales at a great undervalue, from one that was afterwards a lunatic, were set aside, the conveyances were decreed to stand a security for what was really paid.² And, where a bill is filed to set aside a purchase made by a lunatic, and, upon the report of the clerk and master, it appears that the price was not grossly extravagant, and that the lunatic has it not in his power to make compensation if the contract should be set aside; the bill will be dismissed.³

5. The plaintiff contracted for the purchase of an estate from the defendant and paid a deposit, on the terms that, unless he objected to the title within a certain time, it should be considered as accepted. No objection was made by him to the title. The plaintiff, at the time of the contract and of the payment of the deposit, was a lunatic, incapable of understanding the meaning of a contract, or of managing his affairs, and derived no benefit from the contract; but these facts were unknown to the defendant, who made the contract with him fairly and *bonâ fide*, believing him capable of understanding its meaning. Held, the plaintiff was not entitled to recover the deposit.⁴

6. Another form of mental incapacity is *drunkenness*. As a principle of *criminal* law, subject perhaps to occasional exceptions or qualifications, drunkenness is held to be no excuse or justification for crime; and indeed is sometimes said rather to aggravate than extenuate an offence against law. Upon the same principle, drunkenness is regarded as, in general, a less substantial ground for *avoiding contracts*, than any form of mental imbecility, not the result of the party's own act. Still, however, equity will relieve against

¹ Fitzhugh v. Wilcox, 12 Barb. 235.
See Donald v. Morton, 1 Mass. 543;
White v. Palmer, 4 Ib. 147; Leonard v.
Leonard, 14 Pick. 280; Gaugmere, 14
Penn. 417; M'Creight v. Aiken, 1
Price, 156.

² Addison v. Dawson, 2 Vern. 678.

³ Carr v. Holliday, 5 Ired. Eq. 167.

⁴ Beavan v. M'Donnell, 24 Eng. Law
& Eq. 484.

contracts made by a person when drunk, if procured by any fraud or imposition, or even without this accompaniment, in case of excessive drunkenness, where the party is utterly deprived of the use of his reason and understanding. So also, where he has been drawn into drink by some contrivance or management. In other cases, the parties will be left to their rights and liabilities *at law*.¹ (a) (s. 9.)

7. More especially, if, when a man is so drunk as to render him an easy prey to the fraudulent designs of another, an unfair advantage is taken of his situation to procure from him *an unreasonable bargain*, equity will rescind the contract, not on the ground of his drunkenness, but of the fraud.² So a contract may be avoided by the legal representatives of a party, on the ground of his having been drunk when it was made, though such drunkenness was not occasioned by the procurement of the other party.³

8. A. and B., tenants in common of a lot of land, contracted separately with C. to convey to him all their interest therein, on the payment to each of them of \$300. The money being paid, possession was delivered to C., who, after the death of A. and B., filed a bill in chancery against D., their heir, for specific performance. D. by her answer

¹ Beverley's case, 4 Co. 124; 3 Bac. Abr. *Idiots*, &c. A.; Johnson v. Medlicott, 3 P. Wms. 130; Cook v. Clayworth, 13 Ves. 12; Cory v. Cory, 1 Ves. 19; Pitt v. Smith, 3 Camp. 33; Dorr v. Munsell, 13 Johns. 430; Seymour v. Delancy, 3 Cow. 445; Barrett v. Buxton, 2 Aik. 167; Morrison v. McLeod, 2 Dev. & Bat. 221; Ford v. Hitchcock, 8 Ohio, 214; Conant v. Jackson, 16 Verm. 335; Prentice v. Achorn, 2 Paige, 30.
² Calloway v. Witherspoon, 5 Ired. Eq. 128.
³ Wigglesworth v. Steers, 1 Hen. & Munf. 70.

(a) "Where the party, when he enters into the contract, is in such a state of drunkenness as not to know what he is doing, and particularly when it appears that is known to the other party, the contract is void altogether, and he cannot be compelled to perform it. A person who takes an obligation from another under such circumstances is guilty of actual fraud. The modern decisions have qualified the old doctrine, that a man shall not be allowed to allege his own lunacy or intoxication, and *total* drunkenness is now held to be a defence." Per Parke, B., Gore v. Gibson, 13 M. & W. 623.

alleged, that both A. and B. were in habits of intemperance, and almost constantly in a state of intoxication; that the contract was made by them when in a state of intoxication, or when they were incapable of transacting business, at a price greatly below its value, &c. Decreed, that D. convey to C. one undivided part of the lot; but, as to the contract of B., on account of the satisfactory proof of his imbecility, it ought not to be enforced; and that C. deliver to D., or permit her to take or enjoy, the other undivided parts of the lot, without her refunding the consideration paid by C. to B.¹

9. But where, in a suit for the specific performance of an agreement, the principal defence set up was incapacity at the time of executing it, on the ground of intoxication; the Court held, that it could not assist in getting rid of the agreement, on the mere ground of intoxication, no fraud being alleged; but decreed a specific performance with costs.² So it is held, that intoxication of a contracting party is no ground for setting aside the contract, where it was not induced by the other party, unless it is *habitual*, so as to derange the mind, or subject it to frequent fits of derangement, or is so great as to deprive the party of his reason.³ So, that the vendee's being intoxicated at the time, and not in a situation to judge correctly, or act with prudence, will not avail him to avoid the contract, unless he can show that it was procured by the contrivance of the vendor, or that an unfair or improper advantage was taken of his situation.⁴ (s. 6.)

10. We have already had occasion (Chap. 3,) to consider the subject of *consideration*, as an element in the sale of real property, necessary to the validity of this, as of other contracts. It now becomes necessary—assuming *some* consideration to exist—to consider its *amount*, either by way of

¹ Reinicker v. Smith, 2 Har. & John. 421.

³ Hutchinson v. Brown, 1 Clarke, 408.

² Shaw v. Thackray, 23 Eng. Law & Eq. 18.

⁴ Rodman v. Lilley, 1 Saxt. 320.

deficiency or excess, as affecting the validity of the contract. (a)

11. *Inadequacy of consideration*, though not, in general, of itself a sufficient ground for avoiding a contract, is, when gross, strong evidence of *fraud*,¹ and may be so great as to form a ground for cancelling the contract.² Thus, although mere inadequacy of consideration furnishes no sufficient ground for the interference of a Court of Equity to set aside a contract; inadequacy of consideration, united with such a degree of weakness and imbecility of intellect, as would justify the inference that such weakness had been taken advantage of, will afford sufficient ground for this interference.³ More especially an agreement made for a consideration grossly inadequate, by one of great imbecility of mind, with another whose position in relation to him conferred undue influence and control over him, will be set aside.⁴ So suspicion of fraud, coupled with gross inad-

¹ *Lowther v. Lowther*, 13 Ves. 95;
Coles v. Trecothick, 9 Ves. 234.

² *Stillwell v. Wilkins*, Jac. 282.

³ *Mann v. Betterly*, 21 Verm. 326.

⁴ *Cook v. Cole*, 2 Halst. Ch. R. 522.

(a) In remarking upon the subject of *mistake*, (Chap. 18,) we briefly referred to the kindred point of *surprise*, as invalidating a sale of real property. Perhaps surprise may be considered to have a more direct bearing upon the price or consideration than any other part of the transaction; and the following remarks of an approved writer may therefore properly be cited in this connection: "Cases of surprise and sudden action, without due deliberation, may properly be referred to the same head of fraud and imposition. An undue advantage is taken of the party, under circumstances which mislead, confuse, or disturb the just result of his judgment, and thus expose him to be the victim of the artful, the importunate, and the cunning. It is not every surprise which will avoid a deed duly made. Nor is it fitting, for it would occasion great uncertainty; and it would be impossible to fix what is meant by surprise; for a man may be said to be surprised in every action which is not done with so much discretion as it ought to be. The surprise here intended, must be accompanied with fraud and circumvention; or, at least, by such circumstances as demonstrate that the party had no opportunity to use suitable deliberation, or that there was some influence or management to mislead him." 1 Story, Eq. § 251; 1 Foub. Eq. B. 1, ch. 2, § 8.

equacy of price, and the pressure of pecuniary embarrassment, is sufficient ground to rescind a sale;¹ as where the complainant, who was in embarrassed circumstances, his property being levied on, and about to be sold under execution, sold his farm to the defendant, received part of the price in cash, and for the residue accepted a deed of land in another State, which he had never seen, and which was not worth more than one half of the estimated amount.² So a contract will be set aside in equity for inadequacy of consideration, where there is *inequality* in the condition of the parties.³ So, where an *unconscientious advantage* is taken by the vendee of the *improvidence and distress* of the vendor; inadequacy of price, whether so gross as to be *per se* proof of fraud or not, will in equity avoid even an executed contract.⁴ So inadequacy of price alone, when the vendor did not understand the contract, or was induced to make it to escape oppression, will vitiate the sale, whether these facts appear from the inadequacy itself or otherwise.⁵

12. A sale of land at a halfpenny for every square yard, which the vendee knew not to be one fourth part of the value, was held fraudulent and void in equity.⁶ So the purchase of an estate of a tenant for life, who was outlawed and absconded, was set aside in favor of creditors, being made at an undervalue, and pending the prosecution at law against him, and with notice thereof.⁷ So relief was given against a sale, where the purchaser knew that the vendors, the assignees of a bankrupt, were ignorant of a circumstance considerably increasing the value.⁸ So where, on a bill to set aside a purchase, the answer of the defendants, the devisees of the purchaser, admitted great inadequacy of price, and stated their ignorance as to other circumstances of fraud alleged; a receiver was appointed.⁹

¹ Lester v. Mahan, 25 Ala. 445.

² Ibid.

³ George v. Richardson, Gilmer, 231.

⁴ M'Kinney v. Pinchard, 2 Leigh, 149.

⁵ Cruise v. Christopher, 5 Dana, 182.

⁶ Deane v. Rastron, 1 Anstr. 64.

⁷ Herne v. Meers, 1 Vern. 465.

⁸ Turner v. Harvey, Jac. 169.

⁹ Stillwell v. Wilkins, Jac. 280. See Maddeford v. Austurick, 1 Sim. 89.

13. It may be gathered from the general current of authorities upon this subject, that, although a Court of Equity may refuse to enforce an agreement for inadequacy of consideration, yet the inadequacy must be so great, gross, and palpable as to be evidence, perhaps even conclusive evidence, of fraud, or some unconscientious advantage; and, in settling this point, the condition and circumstances of the estate *at the time of sale* are to be the criterion.¹ So it is held that relief will be granted in equity, only where the inadequacy is so extreme as to satisfy the Court, that there must have been *imposition* or *oppression*.² There must have been *unreasonableness, inequality, and hardship*; as where the price amounted to but one half the value of the estate.³ *Weakness and indiscretion* are said not to be sufficient, nor even a *hard and unconscionable bargain*, to set aside the sale, unless fraud or undue means have been used.⁴ The bargain must be such, it is said, "that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it."⁵ So it is held, that, unless the inadequacy is so great as to *shock the moral sense of an indifferent man*, the contract being entered into deliberately and fair in all its parts, such inadequacy is not an objection to its being executed.⁶ (a)

¹ *Fripp v. Fripp*, Rice, Eq. 84; *Osgood v. Franklin*, 2 Johns. Ch. 1; *Western v. Russell*, 3 Ves. & B. 187; *Judge v. Wilkins*, 19 Ala. 765; *White v. Flora*, 2 Tenn. 426; *January v. Martin*, 1 Bibb, 586.

² *Underhill v. Horwood*, 10 Ves. 209; 14 Ves. 28.

³ *Seymour v. Delancey*, 6 Johns. Ch. 222.

⁴ 1 Sugd. 367-8. See 2 Story, Eq. § 235.

⁵ Per Ld. Thurlow, *Gwyne v. Heaton*, 1 Bro. 1.

⁶ *Seymour v. Delancey*, 3 Cow. 445.

(a) The following remarks of an English Judge may, perhaps, be considered as expressing the general doctrine, both of law and equity, upon this subject: "The law will not assist a man who is capable of taking care of his own interest, except in cases where he has been imposed upon by deceit, against which ordinary prudence could not protect him. If a person of ordinary understanding, on whom no fraud has been practised, makes an imprudent bargain, no court of justice can release him from it. Inadequacy of consideration is not a substantial ground for setting aside a conveyance of

14. Thus it was held, that an agreement for the sale and assignment of a present interest in a considerable property should not be set aside on the ground of mere inadequacy of price, where there had been no fraud, concealment, or misrepresentation, where the parties were adults, and the vendors knew as much of the property and its situation and value as the purchaser.¹ So, where a transaction of many years standing was sought to be set aside on the ground of inadequacy of consideration, the relation between the parties, and the incapacity of the vendor; relief was refused, neither of the grounds having been sufficiently made out.² So, although a bill for specific performance of a purchase by auction was dismissed by Lord Rosslyn with costs, merely as being a bad bargain, from inadequacy of value; upon a

¹ *Gregor v. Duncan*, 2 Desaus. 636.

² *Evans v. Brown*, Wight, 102.

property; indeed, from the fluctuation in prices, owing principally to the gambling spirit of speculation that unhappily now prevails, it would be difficult to determine what is an inadequate price for any thing that is sold; at the time of the sale, the buyer probably calculates on a rise on the value of the article bought, of which he would have the advantage; he must not therefore complain if his speculations are disappointed, and he becomes a loser instead of a gainer by his bargain. But those, who from imbecility of mind are incapable of taking care of themselves, are under the special protection of the law. If this conveyance could be impeached on the ground of the imbecility of Fitzsimmons only, a sufficient case has not been made out to render it invalid; for the imbecility must be such as would justify the jury, under a commission of lunacy, in putting his property and person under the protection of the Chancellor; but a degree of weakness of intellect, far below that which would justify such a proceeding, coupled with other circumstances, to show that the weakness, such as it was, had been taken advantage of, will be sufficient to set aside any important deed." Per Lord Wynford, *Blachford v. Christian*, 1 Knapp, 77.

So it is said, if a person will enter into a hard bargain with his eyes open, equity will not relieve him upon this footing only. *Willis v. Jernegan*, 2 Atk. 251. And, with reference to this point of inadequacy, "If Courts of Equity were to unravel all these transactions, they would throw every thing into confusion, and set afloat the contracts of mankind." Per Eyre, Ch. B., *Griffith v. Spratley*, 1 Cox, 383.

rehearing, Lord Eldon was of opinion that this was not a sufficient ground for refusing specific performance of a purchase by auction, without something more, as fraud or surprise, &c.¹

15. It is to be observed, that a sale may sometimes be attended by circumstances, which will constitute a good defence against a bill in equity for specific performance, while at the same time they would not furnish sufficient ground for rescinding the contract. Thus, although mere inadequacy of price is not sufficient ground for setting aside a sale, unless the inadequacy be so gross as to be, of itself, evidence of fraud; still it may be a sufficient ground for refusing to enforce specific performance of the sale.² It is said, Courts of Equity seldom interfere to set aside contracts of sale, on the ground of inadequacy of price. They leave the parties to their legal remedies. But when called on to enforce a contract, they examine into the consideration to be given, its fairness and equality, and all the circumstances connected with it; and if any thing manifestly inequitable appear in that part of the transaction, they will never lend their power to carry the contract into execution.³ So the principle is laid down, that an unexecuted sale of land will not be enforced in equity, if it seems *unconscionable*. But, after it has been executed, a chancellor will not interfere, by declaring it void for that reason alone, except in the case of an heir expectant.⁴ So the Court refused to decree specific performance of a sale, where the inadequacy of price was very great, though there was no direct fraud or imposition; the seller being a young man, just of age, ignorant of the real value of the land, and having acted somewhat precipitately, on being urged.⁵ So it is held, that, although mere inadequacy of price is not a sufficient ground for equity to refuse its assistance; yet, if an *unreasonable* contract be not

¹ *White v. Damon*, 7 Ves. 30. (See a criticism upon this case, in *Seymour v. Delancey*, 6 Johns. Ch. 222.)

² *Osgood v. Franklin*, 2 Johns. Ch. 1, 250.

³ *Rodman v. Lilley*, 1 Saxt. 320.

⁴ *Davidson v. Little*, 22 Penn. 245.

⁵ *Clitherall v. Ogilvie*, 1 Desaus.

performed according to its letter, equity will not interfere; and this whether it was unreasonable when made, or becomes so afterwards, through fault of the plaintiff; as where a very great change occurs in the value of the property, through the vendor's fault.¹

16. While a *vendor* may be prejudiced and claim relief by reason of *inadequacy* of consideration, the vendee, on the other hand, may seek redress on account of *excess* in the price paid or agreed to be paid. Upon this subject it is held, that excess of price over value, if the contract be free from imposition, is not of itself sufficient to prevent a decree for specific performance; but is an ingredient which, associated with others, will contribute to prevent the interference of a Court of Equity.² (a) Thus, where a written agreement is entered into for the purchase of an estate at a price far beyond its value, but without any circumstances of fraud or surprise, the Court will not decree a specific performance of such a contract; but, on the other hand, will not rescind it.³ But where a person deeply in debt, in order to obtain a loan of money, agreed to purchase a tract of land at more than double its value, and give a mortgage upon other property to secure the loan, and part of the purchase-money, the vendor having notice of the purchaser's necessities; held, equity would rescind the contract.⁴ (b)

¹ Garnett v. Macon, 6 Call, 308.

³ Day v. Newman, 2 Cox, 77.

² Cathcart v. Robinson, 5 Peters, 264.

⁴ Hough v. Hunt, 2 Ham. 502.

(a) In case of an attempt by a grantee to avoid the conveyance as unconscionable, from the excess of the consideration, or because there was a gross mistake of all the parties with respect to the condition and value of the estate, it was said, the difference must be such as would "shock all men of common intelligence at first blush, and be itself a proof of fraud or management on the part of the grantors." Per Parker, C. J., Allen, 15 Mass. 65.

(b) Cases often occur, in which there is a combination of circumstances, any one of which would tend to invalidate the sale, though not of itself sufficient to produce that effect; but which, when united, constitute a constructive fraud, that renders the contract voidable. Thus specific performance of an agreement was refused, on the ground of the want of specific

mutuality, of laches, misapprehensions in the party or parties of its nature and effect, inequality, improvidence, and other circumstances appearing in the case. *Hamilton v. Grant*, 3 Dow. 33. So specific performance was refused of a contract improvidently entered into by ignorant persons. *Martin v. Mitchell*, 2 Jac. & Walk. 413. But specific performance was decreed in favor of a purchaser, though no solicitor acted for the vendor; and though the contract was executed under circumstances which might easily have led to fraud, the vendor being considerably in liquor; no fraud being proved in the vendee or his agent. *Lightfoot v. Heron*, 3 You. & Coll. 586.

CHAPTER XXI.

SALE OF EXPECTANCIES.

1. HAVING in the last chapter spoken of implied or constructive fraud, as affecting the validity of a sale, and more especially of that particular fraud which consists in *inadequacy of consideration*; we proceed to another class of contracts, which the law holds to be invalid, by reason of the individual position or character of one, or the mutual relation of both, of the contracting parties. Under this head are included, in the first place, sales made by the holders of *expectant* interests, including remainder-men, reversioners, and heirs, but most especially the parties last named, which, in the common course of things, also involve inadequacy of consideration; and, in the second place, sales made by or in behalf of persons beneficially interested in the property sold, to those charged with some confidential relation with reference to such property. In the former case, the validity of the sale is affected by the *absolute* character or position of the vendor; in the latter by his relative position in respect to the vendee.

2. Mr. Sugden says,¹ “in treating of inadequacy of price, we must be careful to distinguish the cases of reversionary interests, the rules respecting which, especially where an heir is the vendor, depend upon principles applicable only to themselves, and not easily definable. The heir of a family dealing for an expectancy in that family, is distinguished from ordinary cases, and an unconscionable bargain made with him, is not only to be looked upon as oppressive in the particular instance, and therefore avoided, but as pernicious

¹ 1 Vend. & P. 369.

in principle, and therefore repressed. There are two powerful reasons why sales of reversions by heirs should be discountenanced; the one, that it opens a door to taking undue advantage of an heir being in distressed and necessitous circumstances, which may, perhaps, be deemed a private reason; the other is founded on public policy, in order to prevent an heir from shaking off his father's authority, and feeding his extravagances by disposing of the family estate."

3. Upon the same subject, Judge Story remarks: "Relief has been constantly granted in equity, in what are called *catching* bargains, with heirs, and, in modern times, reversioners and expectants, in the life of their parents or other ancestors, or during the continuance of prior particular estates. Many, and indeed most of the cases, have been compounded of all or every species of fraud; there being sometimes proof of *actual* fraud, which is always decisive. There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting; weakness on one side, usury on the other, or extortion or advantage taken of that weakness. Generally, there has been deceit upon third persons; the father or other ancestor has been kept in the dark, and thereby misled and seduced to leave his estate, not to his heir or family, but to a set of artful persons, who have divided the spoil beforehand. The doctrine is founded in part upon the policy of maintaining parental and *quasi* parental authority, and preventing the waste of family estates, as well as of guarding distress and improvidence against calculating rapacity. Equity treats parties in this situation almost like *infants*, incapable of contracting; and, although formerly undue advantage must be shown to have been taken, it now requires the purchaser *to make good the bargain*, that is, not merely to show the absence of fraud, but payment of a full consideration. The Court will relieve upon the general principle of mischief to the public without requiring any particular evidence of imposition, unless the contract is shown to be above all exception. Years do not seem to make much difference in the case of expectant heirs,

since the aim of the rule is principally to prevent imposition upon ancestors. And the same rule applies, it seems, to reversioners and remainder-men, if necessitous, distressed, and embarrassed.¹

4. The doctrine upon this subject, involving other transactions with heirs besides agreements for the sale of their expectant interests, has been stated by the Supreme Court in Massachusetts, as follows: When an heir gives a bond, on receiving a sum of money, to pay a larger sum, exceeding legal interest, upon the death of his ancestor, if the heir shall be then living; if there is only a reasonable indemnity for the hazard, it may be enforced at law. But, if his necessities are taken advantage of, he is relieved as against an unconscionable bargain, on payment of principal and interest. So, when one having a reversion or remainder contracts to sell it, on becoming possession, for money paid at the time of the bargain, a similar rule is adopted. Here there may be a computation of the risk, as involved in the continuance of the preceding estate; and the bargain, like that before mentioned, may be relieved against, if unconscionable. If the reversion or remainder be actually conveyed, equity alone can give relief, unless there were absolute fraud. But a contract made by an heir to convey on the death of his ancestor, living the heir, a certain undivided part of what shall come to the heir by descent, distribution, or devise, is a fraud upon the ancestor, productive of public mischief, and moreover, in the nature of a *wager*, without furnishing any means of computing the risks, &c., as to the amount of the property and the value of the inheritance, and is therefore void both in law and equity.²

5. The query has been suggested, whether every vendor of an expectant interest is not to be regarded in equity as a *young heir*, dealing for his expectancy. But it is stated to be clear, that very anxious protection is extended by equity

¹ 1 Story, Eq. 327, 333.

v. Smith, 9 How. 55; *Hallett v. Collins*,

² Per Parsons, C. J., *Boynton v. Hubbard*, 7 Mass. 119, 122. See *Wheeler*

10, 174.

to all persons selling expectant interests, whether they stand in the relation of expectant heirs or not, and trivial circumstances, added to inadequacy of price, are sufficient to set aside such sales.¹ Chancellor Desaussure says: "There is a distinction made between the cases of young heirs selling expectancies, and of others which I am not disposed to support. It is said, that the former are watched with more jealousy, and more easily set aside than others, on principles of public policy. This was certainly true at first; but the eminent men who have sat in chancery, have gradually applied the great principles of equity on which relief is granted to every case where the dexterity of intelligent men had obtained bargains at an erroneous and unconscientious disproportion, from the ignorance, the weakness, or the necessities of others, whether young heirs or not."²

6. Protection is said to be afforded in equity to an expectant heir or other reversioner, dealing for his expectancy, as approaching to *an incapacity to contract*; as in case of a very advantageous purchase, though without fraud, which would afford no ground for relief between persons standing precisely equal; and *à fortiori* in case of an *unconscionable* bargain.³ So, in order to support a bill in equity by a purchaser for specific performance, where the party contracting to sell was an expectant heir, the plaintiff must show adequacy of consideration *in limine*. Whether, in case of failure to do so, the bill will be dismissed with or without costs, depends on the circumstances of each case.⁴ So the purchase of a reversion from an heir, in the life of his father, at an under-value, was set aside, though, if the heir had died before his father, the purchaser would have lost all his money.⁵ So, whether the heirship be *presumptive* or *apparent*, it is held not to be an interest or possibility capable

¹ *McKinney v. Pinekard*, 2 Leigh, 149.

² *Butler v. Haskell*, 4 Desaus. 687.

³ *Peacock v. Evans*, 16 Ves. 512; *Ryle v. Brown*, 13 Price, 758; *Bawtree v. Watson*, 3 My. & K. 339; *Gowland*

v. DeFaria, 17 Ves. 20; *Berny v. Pitt*, 2 Vern. 14.

⁴ *Ryle v. Brown*, 13 Price, 758; *Bawtree v. Watson*, 3 My. & K. 339. See *Bernal v. Donegal*, 3 Dow. 133.

⁵ *Nott v. Hill*, 1 Vern. 167.

of being made the subject of contract.¹ So, if an heir sells his reversion, in the life of his father, at an under-value, the Court will not, in favor of such purchaser, decree a specific performance of a covenant for further assurance.² So a sale by an heir apparent of interests *in possession* and reversion was set aside, the consideration being inadequate, and advantage having been taken of the vendor's embarrassments.³

7. The plaintiff, having a remainder in tail, and being distressed, conveyed two manors of the yearly value of £300, expectant on an estate for life in his uncle, for the sum of £300, to the defendant, his heirs and assigns, from and after the decease of the uncle without issue male. The plaintiff brings a bill to be relieved against this bargain as unconscionable; and the defendant files a cross bill for specific performance. Lord Hardwicke held it a void conveyance, even in point of law; for, as the plaintiff had a remainder in tail only, he could not dispose of the inheritance. Therefore, the cross bill was dismissed, and the conveyance set aside as a catching bargain against a necessitous heir.⁴

8. A reversioner for life of a leasehold estate sold it, the purchaser obtaining only the opinion of an actuary as to its value, without taking any steps to ascertain its market value in reference to locality. Upon a suit by the vendor, the sale was set aside for inadequacy of price, the defendant not showing that he gave the fair market value.⁵

9. The rule under consideration being founded chiefly upon the ground that such contract is a fraud on the ancestor; it has been held that a covenant, by an heir expectant, that he will convey the estate which shall come to him by descent or otherwise, is valid, if made with the consent of the ancestor, and for a sufficient consideration, and without advantage being taken of the covenantor. Thus, upon an

¹ Carleton v. Leighton, 3 Mer. 667.
See Coles v. Trecothick, 9 Ves. 234.

² Johnson v. Nott, 1 Vern. 271.

³ Portmore v. Taylor, 4 Sim. 182; Gowland v. DeFaria, 17 Ves. 20.

⁴ Barnardiston v. Lingood, 2 Atk. 134.

⁵ Edwards v. Burt, 15 Eng. Law & Eq. 434.

action of covenant broken, it appeared that the defendant executed a deed, "in consideration of \$1,400 paid me by" (the plaintiffs) "my brothers, as well as for the purpose of enabling my father (E. F.) to settle his estate, as far as may be, during his lifetime, among his children and heirs at law;" proceeding to convey all present and future interest in the father's estate, and to covenant that the grantor will claim, &c., no part thereof, and on demand will execute to the plaintiffs any instrument necessary to carry this deed into effect. It appeared that the deed was made with the knowledge and consent of the father. Held, though nothing passed by the deed in the father's lifetime, there being then nothing to grant, yet the covenant to make further assurances might be valid, if made on good consideration, without oppression or advantage taken, and with the father's knowledge and consent. Parker, C. J., says: "In such case, there is no fraud upon him (the father) nor imposition upon the heir who covenants, and no injury to the public, which are the grounds on which such contracts are set aside in chancery. Here a full and adequate consideration was paid to the defendant, who was desirous of receiving that portion of his father's estate, which in the course of law would fall to him. With this, he goes abroad to enter upon business, with a money capital. The father, acquiescing in his wishes, assents to the purchase made by two other sons, thinking this the best mode of providing for the wants of the son who is to leave the paternal roof and seek his fortune elsewhere. There seems to be nothing against good policy in this, and it is not opposed by any case that has been cited."¹

10. So a release by an heir apparent of his expectancy, with a covenant that neither he nor those claiming under him will ever claim any right in the same, is, if made fairly and with the consent of the ancestor, a bar to the releasor's claim thereto by descent or devise, after his ancestor's death.

¹ *Fitch v. Fitch*, 8 Pick. 480, 483.

And such covenant runs with the land, and protects the heirs and assigns of the covenantee. So a release of "all the right, title, or interest," which the releasor "has, or may have, in or unto the estate of his father, whether the same may fall to him by will or heirship," includes future rights to be acquired by the releasor; and a covenant never to make claim to "the premises," is a covenant never to make claim to the estate of the father. More especially, where such deed was made after the will, by virtue of what is termed by the Court "a family arrangement," to which the grantor, his brother, (the grantee,) and their father were parties; and it was left to referees to decide what should be paid by the grantee to the grantor; and the award was made, a note given for the sum awarded, and afterwards paid; the transaction was held not to be invalid.¹ (a)

11. In cases of this nature, the general rule is, to grant relief on payment of principal, interest, and costs, the purchaser being considered as a mortgagee. But, in general, his bill to establish the purchase will be dismissed with costs, except of depositions used by the other party.² Thus the grant of a reversionary rent-charge, after the death of the plaintiff's father (who was old and infirm) upon unreasonable terms, was set aside, but to remain as security for the money really advanced, and costs to be paid as in redeeming a mortgage.³

12. Lapse of time may be a bar to relief. Thus a tenant for life, who was also devisee in trust in remainder for the children of the testator, with a power of appointment by will amongst them, purchased and obtained, from the objects of the power, a release of their reversion at an undervalue, and devised the estate to her son in fee, charged with

¹ *Trull v. Eastman*, 3 Met. 121. Acc.
Edwards v. Burt, 15 Eng. L. & Eq. 434.

² *Peacock v. Evans*, 16 Ves. 512.

³ *Gwynne v. Heaton*, 1 Bro. C. C. 1.

(a) It seems there is the same exception to the rule, where the party is a reversioner, &c., and the bargain is known and not objected to by the prior tenant. *King v. Hamlet*, 2 My. & K. 473-4.

debts and legacies. The son took possession and paid off the legacies and charges. Fourteen years and a half after the death of the tenant for life, and seventeen years after the purchase of the reversion, the assignee of one of the vendors, an object of the power who had become insolvent, filed his bill to set aside the sale. Held, the lapse of time was a bar, notwithstanding the poverty of the *cestui que trust*.¹

13. But a reversionary grant from a person in the situation of an expectant heir, though made thirty-four years, and confirmed by a subsequent deed, was set aside; being obtained by fraud and imposition, the party confirming being ignorant of his rights, and the length of time satisfactorily accounted for. The same principle applies where a party, though apprised of his rights, is compelled to accede to the terms from distress and poverty, occasioned by the party procuring the confirmation.²

14. Transactions of this nature may undoubtedly be confirmed by express ratification, as well as delay, on the part of the injured party. But, where grants in reversion were obtained by an agent and trustee from his employers and *cestuis que trusts*, by fraud and misrepresentation; and afterwards assigned for valuable consideration to a purchaser having notice of the facts and the nature of the title; the conveyances were set aside, it being considered that the fiduciary relations still existed, the grantor being ignorant of his rights, and the circumstances showing a continuation of the fraud and not a confirmation.³ (a)

¹ Roberts v. Tunstall, 4 Hare, 257.

² Dunbar v. Tredennick, 2 Ball &

³ Roche v. O'Brien, 1 Ball & Bea. Bea. 304.

330.

(a) Protection has been extended to an heir even against the act of his ancestor. Thus if a father, possessed of an advowson, which he apparently designed for his son, be prevailed on, when in an infirm state of mind, to enter into articles for the sale of it; equity will not compel specific performance, although there is no imposition or fraud imputable to the purchaser. Bell v. Howard, 9 Mod. 302.

CHAPTER XXII.

CONSTRUCTIVE FRAUD.—TRUST, ETC.

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|--|---|
| 1. General principle of <i>confidential relations</i> .
6. Agents.
10. Trustees.
16. Attorneys, solicitors, &c. | 24. Executors, guardians, &c.
26. Miscellaneous trusts; and exceptions and limitations to the general rule.
37. <i>Remedies</i> . |
|--|---|

1. It remains to consider another kind of *implied or constructive fraud*, which invalidates a sale of real property; to wit, the fraud arising from the mutual, confidential relation of the contracting parties; making their interests identical, and rendering it both adverse to public policy and dangerous to the rights of one of the parties, to sanction any transaction that places them in an opposing or hostile attitude with reference to each other. This class of persons is said¹ to comprise agents, arbitrators, attorneys, assignees of bankrupts, auctioneers, commissioners, creditors or others confidentially employed in reference to a bankrupt's estate, trustees, and mortgagees in trust for sale.

2. The general principle upon the subject is thus stated by a late elementary writer: "It may be regarded as a prevailing principle of the law, that an agent must not put himself, during his agency, in a position which is adverse to that of his principal. For even if the honesty of the agent is unquestioned, and if his impartiality between his own interest and his principal's might be relied upon, yet the principal has in fact bargained for the exercise of all the skill, ability, and industry of the agent, and he is entitled to demand the exertion of all this in his own favor. This principle is recognized to some extent at law; but most

¹ Chit. on Contr. 301.

cases of this kind come before Courts of Equity. At one time, it was understood to be necessary to show that a trustee had taken undue advantage of his position, in order to set aside a purchase by him of that which he was a trustee to sell. But this is not so now. At present, the rule in equity appears to be, that any act by an agent with respect to the subject-matter of the agency injurious to his principal, may be avoided by the principal. If an agent to sell become the purchaser, or if an agent to buy be himself the seller, a Court of Chancery, upon the timely application of the principal, will presume that the transaction was injurious, and will not permit the agent to contradict this presumption; unless, indeed, he can show that the principal, when furnished with all the knowledge he himself possessed, gave him previous authority to be such buyer or seller, or afterwards assented to such purchase or sale."¹

3. The principle is held to be more decisively applicable, where breach of trust is combined with other causes for avoiding the sale.

4. Bill to set aside a sale. The plaintiff, tenant for life of the premises, under a marriage settlement, without impeachment of waste, having become involved in debt and greatly embarrassed, in May, 1801, conveyed all his estate, &c., in the premises to trustees, for the purpose of sale (subject to a rent charge of £150 per annum, reserved to himself,) for the benefit of such of his creditors as should execute the deed. Immediately afterwards, he went to reside in the Isle of Man, for the manifest and avowed purpose of personal protection from his still unsatisfied creditors. The trustees thereupon employed a land surveyor, for the purpose of measuring and valuing the plaintiff's interest in the premises, preparatory to putting them up for sale. The surveyor was assisted throughout by his son, the defendant, who had very recently been his father's partner in the business, himself also a land surveyor and auctioneer, and had great share

¹ 1 Pars. on Contr. 74-5.

in making the valuation, by measuring and mapping the estate, &c. The result of that valuation (completed in December, 1801,) was an estimate, stating the annual value to be £232 3s. 5d. On the 6th of February following, the estate was put up to sale by auction, and the defendant employed as auctioneer. The estate not being then sold, as no one had offered any bid, the defendant, on the next day, proposed to the trustees to purchase it himself for £500. They immediately acceded to the proposal, and let the defendant into possession on the 15th of April, but did not require of him to pay the purchase-money till the 5th of March, 1803, when the conveyance to him was executed, and they then received it without taking or requiring interest. That conveyance was soon afterwards executed by the plaintiff, who came from the Isle of Man for that purpose, upon receiving a letter from one of the trustees, informing him that if he did not execute the deed the annuity of £150 would be no longer paid. At the time of sale there was a quantity of valuable timber on the estate, said to be worth from £300 to £700, which had not been taken into the above estimate. Bill to set aside the purchase, as made by a person of skill in business, employed confidentially to value and sell the estate for the vendor's advantage; for knowledge in consequence acquired by him, fraudulent abuse of trust, inadequacy of price, and duress and coercion. Upon these several grounds taken in connection, and some of which, it was said by the Court, would of themselves have been sufficient ground for its action, the sale was set aside. Lapse of time was held to be no bar, in consideration of the plaintiff's having been, from poverty and embarrassments, *non compos sui*.¹

5. So, where a conveyance of an estate, obtained upon a pretended purchase from *an aged and illiterate man*, by a person who stood towards him *in a confidential position*, was set aside; the Court, being of the opinion that there was in

¹ *Oliver v. Court*, 8 Price, 127.

fact no purchase, refused to give the defendant a decree for an account of moneys paid by or owing to him, which he alleged (but failed to prove) was the consideration agreed upon for such purchase and conveyance.¹

6. The confidential relations, which are understood to be violated by transactions of the nature now under consideration, are those of *agency* and *trust*. These are to some extent identical; all agents being in a certain sense trustees; and all trustees, agents. It has been said, however, that "the rule is applied not so much to those who act as servants, or instruments for some particular things, as to persons whose employment is rather a trust than a mere service."² But *agents*, from the very nature of their employment standing in a confidential capacity, are clearly subject to the rule. (a) Thus, the defendant, being tenant of a manor, and being employed by the plaintiff, and having agreed, to purchase it for him, purchased it in his own name. He afterwards let the plaintiff into the purchase by a mutual deed, which, however, omitted many things comprised in the purchase deed. Upon a bill for relief against such omissions, decree for the plaintiff.³

7. Decree setting aside a purchase by an agent from his

¹ *Wilkinson v. Fowkes*, 15 Eng. Law & Eq. 163.

² 1 Pars. on Contr. 75.

³ *Nelson v. Nelson*, Nels. Cha. Rep. 7.

(a) It is said, the principal bargains for the exercise of the disinterested skill, diligence, and zeal of the agent, for his own exclusive benefit. Story on Agency, § 246. See Smith's Merc. L. 93. So also, it may be correctly said, with reference to Christian morals, that no man can faithfully serve two masters, whose interests are in conflict. *Ib.* § 210. And the doctrine, though chiefly applied in equity, seems to be equally well settled *at law*. *Taylor v. Salmon*, 2 Mees. & Cr. 139.

Upon this ground it has been even held, that a memorandum made and signed by a seller, at the request of the purchaser, will not bind the latter, as a memorandum within the Statute of Frauds. *Wright v. Dannah*, 2 Camp. 203. Upon the same ground, an agent, who discovers a defect in his principal's title to lands, cannot misuse it to acquire a title for himself, but will be held a trustee for his principal. *Ringo v. Binns*, 10 Pet. 269.

principal. A reconveyance, and the usual accounts of rents and purchase-money were directed, making allowance for substantial repairs and lasting improvements. The defendant having sold and conveyed part of the property, *pendente lite*, and died before the accounts were completed; a supplemental bill was filed against the purchasers, and the heir and personal representatives of the defendant, charging that the purchasers, in case of eviction, claimed compensation out of his estate; and the conveyances *pendente lite* were set aside. Held, the purchasers were entitled in this suit, as against their co-defendants, the personal representatives of the original defendant, to an order for repayment of their purchase-money, and, as against the plaintiff, to an allowance for substantial repairs and lasting improvements, but to no greater relief. Also, that the heir and personal representatives were proper parties.¹

8. An agent employed to sell estates took them for himself, under color of a fictitious purchase, and sold a part. He also fraudulently prevailed on his principal to execute a lease at a losing rent. After his death, an inquiry was directed, to ascertain the real value, according to which his estate was to be charged; the principal having an option to take what remained unsold; and the agent's estate was charged with the loss arising from the lease.²

9. Four persons agree to purchase of the State a tract of land, give their joint note for the consideration, and take a writing from the agent of the State to make a deed on demand; they also authorize one of their number, in writing, to take a deed of the same, and sell it for the whole, each being entitled to the extent of one fourth by their private agreement. Held, that one has an interest in the whole as agent, besides his interest as principal in one fourth. And, if he gets a deed from the State for one eighth, running directly to a purchaser of one eighth, instead of one to himself, and

¹ Trevelyan v. White, 1 Beav. 588.

² Hardwicke v. Vernon, 4 Ves. 411 ;
14 Ves. 504.

then from himself to the purchaser, he is answerable for the whole consideration received, on the sale being rescinded. But if, after the sale, he divided the whole of it between the other three owners, concluding to keep as his own share the other one fourth of the land, having sold in all to various persons three fourths of it; the other three are responsible to refund, in aid of him, the one third each received.¹

10. The most numerous class of cases, falling under this general head, is that of *trusts*, technically so called; where one party is not merely employed by another to perform an act in relation to property for him, but is entrusted with the property itself. Under these circumstances, as has been stated, it is the general rule, that a trustee shall not be allowed to purchase the trust property for his own benefit; either directly or through an agent. He who undertakes to act for another, in any matter, shall not in the same matter act for himself, and make the business an object of interest. Although the *cestui que trust* be of age, the transaction morally fair and honest, a higher price paid by the trustee than any one else would give, the estate taken at an appraisement or in the name of a third person; it has been held that the transaction may be set aside by the *cestui*. The trustee purchases *subject to that equity*.²

11. We have already had occasion to notice (Chap. 9, s. 17,) the exception from the Statute of Frauds of that class of cases, in which one person purchases real estate for the benefit of another, and under a verbal agreement that the latter shall have the benefit of the purchase. These are for the most part *sales on execution*, where some friend of the execution debtor interposes to purchase the property for his use. The violation of the agreement in such case comes under the present head of *constructive fraud*. (a)

¹ Doggett v. Emerson, 1 Woodb. & Ringgold v. Ringgold, 1 Harr. & G. M. 195, 206. 11; Whichcote v. Lawrence, 3 Ves.

² Campbell v. Walker, 5 Ves. 680; 740.

(a) An agreement of this nature may also avoid the sale, subject, however, to an equitable claim for actual outlays. Thus a sheriff's sale was

12. And *the principle* is extended to other analogous transactions, the effect of which is to injure a debtor, though not by violating any trust, to which he is in terms a party. Thus the land of A. was advertised for sale on an execution in favor of B. C., who had purchased the land, without knowing of the judgment and execution, agreed with B. who attended the sale, that, if he would not bid against him, he would pay B. the amount of his execution, and give him his note for the further sum of \$150, and B. acceded, and desisted from bidding. Action on the note against C., by an indorsee, who took it after it became due, with notice. Held, the consideration might be inquired into; and, being unconscientious, and against public policy, the note was void.¹

13. So, where a judgment and execution, which had been fully paid and satisfied, were kept on foot by the assignees of the judgment, fraudulently, for the purpose of speculating on the property of the debtor, of which the defendants, assignees or owners of such property, became purchasers at a sheriff's sale; they were decreed to execute a *release* of all their title and interest so acquired, to the owner of the lands thus fraudulently sold in execution, to deliver up possession, and to pay the rents and profits, and damages for any *waste* committed, with all costs, &c.²

14. Bill in equity. The plaintiff having purchased at auction from D. a lot of land, on his failure to comply with the terms of the sale, D. entered and took possession, but, on application by the plaintiff, was enjoined in equity from

¹ Jones v. Caswell, 3 Johns. Cas. 29.

² Troup v. Wood, 4 Johns. Ch. 228.

made to one who purchased at the instance of the debtor, and conveyed to a trustee for the benefit of the debtor's family. The mother of the debtor's wife advanced money towards the purchase, which went to the payment of his debts. The trustee afterwards paid out money in discharge of a mortgage, to which the land was subject when sold, and neither of them was accessory to the fraud. Held, the sale, under the circumstances, should be set aside, but the money thus advanced should be refunded, and the land stand as security for the payment. *McMeekin v. Edmund*, 1 Hill, Ch. 288.

making a sale thereof. A new arrangement was then made, by which D. placed a warranty deed in the hands of P. in escrow, agreeing that it should be surrendered to the plaintiff on a certain day, provided he had complied with certain terms of payment, the plaintiff making a deposit of \$1,000 as forfeit money. The plaintiff then proceeded to build on the land, but, failing in his means, was unable to comply with his agreement. D. then threatened to sell the premises, and the plaintiff filed a second bill in equity to restrain the sale, and an injunction was granted, and an interlocutory decree passed, that, if he should perform his agreement before a certain time, the injunction should stand continued, otherwise be dismissed. He failed to perform his agreement, and the bill was accordingly dismissed. Between the decree and the dismissal of the bill, the plaintiff, having expended large sums on the building, and exhausted his resources, applied to E., one of the defendants, for aid to raise money, in order to complete the building and discharge the debts; and it was arranged between them, that an absolute conveyance should be made by D. to E., which was done. On the same day the plaintiff executed a release of all interest to E. to complete the title, excluding in terms "all claims and demands made by, through, or on account of the plaintiff, and also excepting any claims or demands arising out of any contract made by or with the plaintiff," and admitting that he had no legal or equitable right in the same. E. then assumed the ostensible ownership, but the plaintiff was employed in superintending the erection of the building, procured securities to assist in raising funds, and also had work done on his own account. E. afterwards sold the premises to K., another defendant. The bill alleges that, at the time of making the conveyance to E., although there was no writing to such effect, it was understood between E. and the plaintiff, that the premises were to be held by E. in trust, for the benefit of the plaintiff; and that the conveyance was made absolute, solely for the purpose of freeing the premises from all claims by or through the plaintiff, and that

E. was only to receive a remuneration for his services and indemnification for his expenses, and then to reconvey to the plaintiff; and also that K. was not a *bonâ fide* purchaser without notice. Held, 1. That the circumstances showed no sufficient motives on the part of the plaintiff to make an absolute and unrestricted conveyance, but that they were perfectly consistent with the parol trust set up.

2d. That the former decree, not being a dismissal upon the merits, was not an absolute bar to a future suit.

3d. That the release by the plaintiff, though absolute in its terms, was indispensable to guard the property against his creditors, and induce capitalists to advance funds, and therefore was not inconsistent with a parol trust; and that the evidence was irreconcilable with any other supposition, than that E. was acting throughout as the agent of the plaintiff.

4th. That if E., knowing that the plaintiff only intended that he should act as agent, did, nevertheless, intend to act for his own benefit solely, the concealment of such a design from the plaintiff was a fraud in equity.

5th. That this was a case of parol trust, resulting from agency, and resting upon honorary obligations, and as such equity would enforce it.

6th. That it was not within the Statute of Frauds, because, 1st. A resulting trust as to the plaintiff, and a trust as to E. merely for his liabilities, compensation, and expenditures. 2d. A case of agency. 3d. Of constructive fraud. 4th. Of part-performance.

7th. That K. was not proved to be a *bonâ fide* purchaser without notice, even if he had no notice of the actual state of the title and claim of the plaintiff, having sufficient notice of the claim and controversy to be put upon inquiry.

8th. That although the plaintiff may never have been able to discharge the incumbrances and remunerate the defendant as agreed, equity would not therefore decree that his rights were extinguished, though it might on this ground fore-

close his rights and order a sale, on application by the defendant.¹

15. A., having an equitable interest in land, of which he was in possession, and which was about to be sold at a judicial sale, agreed by parol with B., that he, B., should purchase it for the benefit of A.'s wife and children. B. stated the agreement to several persons, and his statements were calculated to stifle competition among bidders, and actually did prevent one person from attending the sale and bidding. B. purchased the land at about half its value, and then refused to comply with his agreement. Held, that B.'s conduct was fraudulent, and he was not allowed to retain the land.² (a)

16. Upon similar principles of policy, no *attorney* shall purchase the property involved in a litigation of which he has the management.³ (b) Thus counsel consulted respecting a title cannot buy in an outstanding adverse claim, and set it up against the client.⁴ So a solicitor, who purchases from his client, is bound to prove that he paid that price for the property which, in the exercise of his professional duty, he would have advised his client to accept from a third person.⁵ So, in order to render valid such purchase by a solicitor from his client, the former must show that he gave his client all the reasonable advice against himself, which his office would have required against a third person; varying, however, ac-

¹ *Jenkins v. Eldredge*, 3 Story, R. 181.

⁴ *Hackenbury v. Carlisle*, 5 W. & S. 348.

² *Kinard v. Hiers*, 3 Rich. Eq. 423.

³ *Hall v. Hallet*, 1 Cox, 134.

⁵ *Champion v. Rigby*, 1 Russ. & My. 539.

(a) It is deemed unnecessary to cite more of the numerous cases to be found in the books, which establish, recognize, or illustrate the general principle stated in the text, that a trustee cannot purchase the trust property. Some of those which point out exceptions, qualifications, or peculiar applications of the rule, will be briefly referred to in a subsequent part of this chapter.

(b) As to the signification of the terms "undue influence," as applied to transactions between solicitor and client, see *Casborne v. Barsham*, 2 Beav. 76.

according to the subject of the purchase, the relative situation of the parties, and the equality of the footing upon which they stand in reference to the subject. But, if the relation does not exist *in hac re*, the rule with regard to the *onus* of proof may no longer be applicable.¹

17. An attorney, consulted by a vendor respecting the sale, himself became the purchaser at auction. Held, a bill brought by him for specific performance should be dismissed, with costs.² So an agreement entered into between an attorney and his client, for the purchase by the attorney, at an under price, of estates to which the client had a good title, but of which he was not in possession, was set aside for fraud and maintenance.³

18. Agreement for a reversionary lease, obtained by an attorney from the son of his employer, who was remainderman in a settlement, under which his father, who had granted the existing lease, was tenant for life. Bill for specific performance dismissed. A., under a settlement executed in 1716, was tenant for life, with power to lease for any term not exceeding thirty-one years, remainder to his first and other sons successively in tail male. In 1745, A. granted to B., who was then acting as his attorney, a lease of lands, comprising two hundred acres of good land, Irish plantation measure, for three lives or thirty-one years, whichever should last the longest. C. was the only son of A. In 1749, C., by a writing indorsed upon that part of the lease of 1745 which was in the possession of B., in consideration of £20, agreed to ratify that lease, and, on the expiration of the term, to grant a renewal for a further term of (blank) lives. The agreement was not indorsed on the counterpart of the lease, and was not registered till June, 1760. In May, 1760, A. died, leaving C., who by deed, in 1760, settled the lands in trust for himself for life; remainder to his two daughters as tenants in common. The respondent became entitled to

¹ *Edward v. Meyrick*, 2 Hare, 60.

³ *Jones v. Thomas*, 2 You. & Coll.

² *Salmon v. Cutts*, 5 Eng. Law. & Eq. 93.

one moiety of the lands, as the only son of one of the daughters, and, at a sale under a decree in chancery in 1814, purchased the other moiety. At the time of sale, it was mentioned that the lands were sold subject to the lease of 1745. B. died in 1780, leaving D., who was the last surviving life in the lease of 1745, and held the lands under the lease till his death, which took place in 1817. The appellants claimed as devisees of D. In 1820 the appellants filed a bill in chancery, stating the facts above mentioned, and praying specific performance of the agreement to grant a renewal of the lease. Held, they were not entitled to such relief.¹

19. On a contract for the sale of part of an estate, the purchaser requiring a fine for the purpose of removing admitted defects in the title, the vendor employed an attorney, who was his relation, and had been professionally employed by him on previous occasions, to levy the fine and complete the contract. The attorney advised the levying of a fine of the whole of the vendor's estate, without telling him the effect of it; such fine was accordingly levied, and the vendor died without declaring its uses, and without republishing his will, previously made, by which he had devised the whole estate to his wife, who survived him. After the vendor's death, the attorney claimed the estate as his heir at law, alleging that the will was revoked by the fine, and brought actions of ejectment to recover possession thereof. The widow filed a bill in chancery for relief, and, on an issue directed by that Court, a jury found that the attorney fraudulently concealed what effect the fine would have upon a devise. The Court of Chancery, upon that verdict, decreed the attorney to be a trustee for the devisee. The House of Lords, affirming that decree, held, further, that the attorney's alleged ignorance of the effect of the fine, and his omission to inquire whether the conusor his client had made such a

¹ *Blakeney v. Bagott*, 3 Bligh, N. S. 237. See *Twistleton v. Griffith*, 1 P. Wms. 310.

will, constituted such professional ignorance and neglect, as would make him in a Court of Equity, independent of the ground of fraud, a trustee.¹

20. In 1824, A. was appointed the solicitor for B. and also employed as an agent, for the purpose of repurchasing or redeeming certain annuities, which had been granted by B. In 1825, A., at his own suggestion, was appointed the irrevocable land agent and receiver of B., in order to induce certain of the annuitants to make reductions in their claims; and A., from that period until May, 1838, furnished various accounts, as such agent and solicitor, which accounts were, from time to time, settled and signed as between the parties. In 1830, A., while still in the employment of B., took an assignment of one of the annuities for his own benefit, having paid a less sum than that which had been agreed upon by the deed for its repurchase. In 1838, A. obtained a loan of £12,000 for B., B.'s son, C., joining in the security. This loan was made at five and a half per cent. per annum, and the deed contained mutual covenants, binding the lender on the one hand not to call in, and the borrower on the other not to pay off, the loan for five years. In 1838, and contemporaneously with the other mortgage, A. obtained a mortgage of the equity of redemption, to secure £6,250 at six per cent. per annum. This deed contained no clause restraining A. from calling in the money. It also appeared, that a portion of this sum was intended to secure untaxed costs already incurred, as well as costs to be incurred. In 1839, the original bill in these causes was filed by A., praying a foreclosure of his mortgage of 1838, and for liberty to redeem the prior mortgages. In 1840, B. and C. filed a cross bill, impeaching the mortgage and the two accounts, upon foot of which the balance for which it was given was struck, and also praying to be declared entitled to the benefit of the purchase made by A. in 1830. Held, the prior mortgagees declining to be redeemed, that the original bill should

¹ Bulkley v. Wilford, 2 Cl. & Fin. 102.

stand dismissed, as against them, with costs, and that the original bill would also have been dismissed as against B. and C., were it not for the accounts prayed by the cross bill. Held, also, that A. was a trustee for B. for the repurchase of the annuities, and that B. was entitled to the benefit of such purchase.¹

21. The general rule has been held applicable to a sale on execution, at *auction*. Thus land was sold on execution, and the plaintiff directed his attorney to bid it off. The attorney admitted he had done so, and said the deed would be made to the plaintiff, and that he had made a *temporary* sale, to save the expense of advertising, and would receipt the execution when paid. The sale was made on a stormy day, and only the officer and the attorney attended. The attorney purchased the land, and afterwards conveyed to one having notice of the facts. The land was worth \$2,000, but only \$80 due on the execution. Held, the judgment debtor might redeem, on payment of the latter sum and interest, the amount paid by the attorney or second purchaser to discharge incumbrances, and the cost of improvements made by the latter.² So, where an attorney employed to collect or foreclose a *mortgage*, took a conveyance to himself of the equity, instead of foreclosing; held, the estate was subject to the trust in the hands of his heirs, and that they were bound to reconvey, on payment of the sum paid for the equity, and of the trustee's claim for his services, together with the value of improvements made by themselves before notice of the trust.³ So, beneficial contracts and conveyances, obtained by an attorney from his client, during their relation as such, and connected with the subject of the suit, being also liable to the charge of champerty; were decreed to stand as a security only for what was actually due, and purchases by the attorney were declared a trust. So a subsequent deed, not a separate, independent,

¹ Lawless v. Mansfield, 1 Dru. & War. 557.

² Howell v. Baker, 4 Johns. Ch. 118.

³ Giddings v. Eastman, 5 Paige, 561. See Davinney v. Morris, 8 Watts, 314.

voluntary transaction, but under the same pressure, and called for under the covenant for further assurance, was held no confirmation.¹

22. It is held, however, that an attorney may contract with his client, provided no advantage be taken of this relation. If he be employed to sell, and choose to deal for the estate, he must withdraw from the connection, or put himself completely at arm's length, and show, if the contract be questioned, that he has given the same advice for the benefit of his client, as he would have done if the sale had been to a third party. If employed as a general land agent, he is bound, if he purchases any of the estates, to communicate to his principal all the knowledge, acquired by him as agent, of the real value of the estate. But mere attorneyship does not prevent his entering into a valid contract with his client.² So, after a delay of eighteen years, a bill filed by a client against his solicitor, to avoid a purchase, was dismissed.³

23. Purchase of a reversionary interest by an attorney from his client, which proved in the event advantageous, but made without fraud or any representation; the proposal coming from the client, no confidence being reposed, and both being ignorant of the value. The bill charges fraud and misrepresentation, confidence, and knowledge on one side, with ignorance on the other, but omits the only incorrect circumstance, that the receipt was taken as for money paid, though the real consideration was by deduction from a bill of costs, not then of that amount. Bill dismissed, without costs.⁴

24. The same principle is often applied to purchases made by parties, who are charged with trusts in relation to *the estates of deceased persons*. (a) Thus, a purchase by the

¹ Gibson v. Jeyes, 6 Ves. 266.

² Cave v. Allen, 2 Dow. 289. See

Edward v. Meyrick, 2 Hare, 60.

³ Champion v. Rigby, 1 Russ. & Myl. 539.

⁴ Montesquieu v. Sandys, 18 Ves. 302.

(a) It is said, that, if heirs elect to set aside purchases made by executors,

general agent of heirs, of the land of their ancestor, from the vendee at a tax sale, instead of redeeming the land, enures to the benefit of the heirs.¹ So, where executors, having authority to sell, sold with the intent of repurchasing; held, the sale was voidable.² So, in case of a devise of land mortgaged, with a direction to the executors to redeem; though having assets, they took an assignment of the mortgage. Held, they took in trust for the devisee.³ So, where an administrator purchases land, sold upon a judgment in favor of his intestate; he takes it in trust.⁴ So, if an executor purchase the land of his testator at sheriff's sale, recede from his purchase, and the land be resold; he is chargeable for the highest price.⁵ So, where an executor purchases land, and takes a conveyance to the estate, this is *prima facie* a declaration of trust, and the land will be subject to division among the heirs.⁶ So a purchase by an executor, at an Orphan's Court sale for payment of debts, is voidable by the devisee or heir, even though the devisee did not interfere in procuring such order, but the petition was presented, the bond given, and the sale made, by another executor.⁷ So, where one of two executors, empowered to

¹ Myers, 2 Barr, 463.

² Den v. McKnight, 6 Halst. 385.

³ Jenison v. Hapgood, 7 Pick. 1.

⁴ Fellows v. Fellows, 4 Cow. 682. See

Darcus v. Crump, 6 B. Mon. 363;

Painter v. Henderson, 7 Barr, 48.

⁵ Guier v. Kelly, 2 Bin. 294.

⁶ Garrett v. Garrett, 1 Strobh. Eq. 96.

⁷ Beeson v. Beeson, 9 Barr, 279.

administrators or guardians, at their own sale, they must go into a Court of Equity. Worthy v. Johnson, 8 Geo. 236.

The general principle is applied to other transactions of similar effect, as well as direct purchases. Thus an action was brought against A., an administrator, for his own benefit, but in the name of B. A. suffered a judgment to be rendered against him, and, in the levy of the execution upon the intestate's estate, acted both as defendant and agent of B. Held, the proceedings were collusive and illegal, and the levy void against a subsequent execution in favor of C. Goddard v. Divoll, 1 Met. 413.

Upon the same ground, one to whom a legacy is given, coupled with a trust, is chargeable with the latter, and cannot legally deal with the *cestui que trust*. McCants v. Bee, 1 McC. Cha. 383.

sell real estate, sells to the other, who has resigned his trust, he being an heir and devisee, and trustee for others, the former cannot maintain a bill in equity for specific performance of such contract.¹ It is said,² "We cannot sustain upon principles of sound policy contracts of a character like the present. For although we have no reason to doubt that this individual transaction is fair in its motives, and beneficial perhaps to the other children of the testator; still to affirm it would sanction the principle, that an executor may bargain with his coexecutor for the estate of the testator or a part of it, and then, by the resignation of him who is to have the estate, a conveyance can be made to him by the other; and this, where, as a trustee, he is still in privity with the estate. And though conveyances to trustees may be examined in a Court of Equity, and set aside, as it regards heirs or *cestuis que trust*, still the conveyance would be voidable only in the first instance, and a title might perhaps be passed to strangers purchasing without notice." But it has been held, that, where land is sold under a testamentary power by trustees, an executor, not one of the trustees, may purchase.³

25. The same principle has been applied to *guardians*. Thus a guardian sold his ward's land by auction, himself being the auctioneer, and employing an agent to bid on his account. A question arising, whether the bid of the agent or a higher one by another person was the last before the hammer was down; the guardian decided in favor of the former. The conditions provided that the buyer should take the land at an estimated quantity, unless he elected at the sale to have it measured. The agent did not so elect, but the guardian had the land measured, and it fell below the estimate. The guardian afterwards sold the land at an advance, but in his account charged himself only with the price determined by the measurement. Held, he was bound

¹ *Shelton v. Homer*, 5 Met. 462.

² *Ibid.* 458, per Hubbard, J.

³ *Cudburry v. Duval*, 10 Barr, 265.

to account for the sum for which he resold; and, although there was evidence tending to show a rescinding of the second sale, the deed not being on record, but within the power of the guardian, but the grantee still remaining in possession; still the guardian could not claim another sale, to determine the amount which he should account for.¹ But he was allowed the sum paid to his agent for his services in purchasing the land.²

26. Upon the general grounds, relating to agency and trust, which have been considered in this chapter, it may be added, by way of miscellaneous examples, that, if the property purchased by a trustee is *a lease*, and he renews it in his own name, the renewal is for the *cestui's* benefit. So, if a trustee buys in *an incumbrance* upon the estate, he can hold it only as security for the sum paid by him, with interest.³ So where one of several *remainder-men* purchased the particular estate avowedly for all; held, a trust for the others.⁴ So the rule applies to *public* trusts; as where a member of the legislature sought to obtain a title from the land-office, after the claimant had petitioned for confirmation of his right.⁵ And it has been adopted in church as well as state. Thus, where a rector was authorized, with consent of the bishop, to raise money by an annuity for the rectory house; and the bishop advanced the money, and obtained a grant of the annuity charged on the living; held, the proceeding was wholly void.⁶ (a)

¹ Hayward v. Ellis, 13 Pick. 272.

² Ibid.

³ Killick v. Flexney, 4 Bro. 161;

Quackenbush v. Leonard, 9 Paige, 334;

Waters v. Bailey, 2 Y. & Coll. Ch. 219;

Tanner v. Elworthy, 4 Beav. 487;

Webb v. Sugar, 2 Y. & Coll. 247.

⁴ Anderson v. Bacon, 1 Mar. 51.

⁵ O'Neill, 2 Bland. 151.

⁶ Greenlow v. King, 3 Beav. 49. See Fuller v. Dame, 18 Pick. 472.

(a) In Arnold v. Brown, 24 Pick. 89, it was attempted to avoid a sale of personal property, on the ground that it was purchased by an attaching officer, subject to the lien of the attachment; and that he stood in such a fiduciary relation to the debtor and the attaching and other creditors, as to bring the case within the principle of a sale of trust property. But this principle was held inapplicable to such a case. Morton, J., says, (p. 97,)

27. Upon similar grounds, where an administrator, who was prosecuting a suit in the name of an intestate, prevailed on one of the next of kin, an aged lady living in his own family, under the pretence that she was running great risk by the suit, to release to him all her right in the estate; held, he could not be permitted to avail himself of it.¹

28. The general rule, which has been considered in this chapter, being established for the protection of parties who have entered into a confidential relation with others, (a) it follows, as a necessary inference, that a purchase made by a trustee (and the same is true of *agents* and all other parties confidentially employed) is not absolutely *void*, but *voidable*

¹ *Baxter v. Costin*, 1 Busb. Eq. 262.

“The property attached bears very little resemblance to a trust fund, and the sheriff cannot be considered as sustaining the relation of agent or trustee in any sense, to the defendant in the attachment. He is the officer of the law, and as such holds the property attached. It may be considered in the custody of the law. The debtor is not considered to be under the control or influence of the officer, nor in any degree incapacitated from acting for himself, and assisting and (in) maintaining his own rights. There is no such fiduciary relation between them as to form any obstacle to their contracting with each other. Their interest is adverse, and there exist the ordinary securities for fair dealing and equal terms in their negotiations.” He proceeds to remark, however, that the relation of these parties is such as to induce close scrutiny for the purpose of preventing any fraud or oppression.

(a) Upon this ground it has been held, that though, in general, a person who undertakes to act for another cannot, in the same matter, act for himself, it is not universally true that a trustee cannot purchase the trust estate; but circumstances may render it necessary, in order to protect the interests of the *cestui que trust*. *Spindler v. Atkinson*, 3 Md. 409. So a trustee may purchase the trust property from his *cestui que trust*, who is *sui juris*, if there is a distinct *bonâ fide* contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances, on the part of the *cestui*, that the trustee should purchase; and if there is no fraud or concealment, and no advantage taken by the trustee of information acquired by him in that character. *Bryan v. Duncan*, 11 Geo. 67. A trustee may discharge a prior incumbrance for the benefit of the estate, and reimburse himself out of the trust property. *Crutchfield v. Haynes*, 14 Ala. 49.

at the election of the *cestui*, within a reasonable time. But if, after notice of the transaction, the latter confirms, or unequivocally acquiesces in the sale; this will be a ratification both in law and equity.¹ (a) Thus a *cestui* knowing of a purchase of the trustee, and of his right to avoid it, may ratify it, by assenting to the application of the purchase-money to his use.²

29. By virtue of the same qualification of the general rule upon this subject, if a trustee, who himself purchases, make improvements, he will be allowed therefor upon a resale ordered by the Court. In some cases, the property will be put up at the original price, in addition to the cost of the improvements, and, if it will not bring more on the sale, the original purchase will be allowed to stand.³ So it has been held, that a bill filed by a *cestui que trust*, to set aside a sale at which the trustee became the purchaser, is demurrable, if it does not contain an offer, or what is equivalent to such offer, to do what is equitable, by the repayment or allowance to the trustee of the amount actually paid by him.⁴

30. Upon the filing of a bill in equity to obtain a resale, it will be referred to a master to settle, whether such resale would be beneficial to the plaintiff; and, if made, and not for an increased price, the trustee will be required to complete the purchase.⁵

31. A trustee for payment of debts purchased the estate

¹ Prevost v. Gratz, 1 Pet. C. C. 368;
Mason v. Martin, 4 Md. 124.

² Beeson v. Beeson, 9 Barr, 279.

³ Mason v. Martin, 4 Md. 124.

⁴ Gunn v. Brantley, 21 Ala. 633.

⁵ Campbell v. Walker, 5 Ves. 678.

(a) It is said, upon the same principle, "Strangers to the property cannot call the sale in question. It is an abuse of authority, which may be taken advantage of by any one whose interest is affected. Hence *cestui que trusts* and all for whom the trustee or agent acted, have an option to avoid the sale and retain the property sold, or to confirm the sale and receive the consideration, as may be for their interest." Per Morton, J., *Litchfield v. Cudworth*, 15 Pick. 31.

as agent for his father, both being creditors and partners ; but the *cestui* had full knowledge and took the sole management of the sale, making surveys, settling the particulars, prices, &c. Held, the purchase was good.¹

32. Upon the same general principle, it is held that neither remainder-men, strangers, nor parties to the deed, nor those claiming under them, nor the trustee himself, can avail themselves of the objection. But the representatives of the party beneficially interested may avoid such sale.² (a)

33. Whether a sale *at auction* falls within the general prohibition upon this subject, is a point not fully settled. The weight of authority is that it does.³ Thus it is held,

¹ Coles v. Trecothick, 9 Ves. 234. See Murdock, 2 Bland, 467; Allen v. Bryant, 7 Ired. Eq. 276; Kennedy v. Kennedy, 2 Ala. N. S. 572.

² Thorp v. McCullum, 1 Gilm. 614; Painter v. Henderson, 7 Barr, 48; Wheelers, &c. 2, 71; Ward v. Smith, 3

Sandf. Cha. 592; Pitt v. Petway, 12 Ired. 69.

³ See Rogers v. Rogers, 1 Hopk. 527; Eichelberger v. Barnitz, 1 Yea. 312; Drayton v. Drayton, 1 Des. 567; Hudson v. Hudson, 5 Munf. 180.

(a) The mortgagee or creditor in a trust deed may purchase at the sale provided for by the deed. But in case of any want of fairness and good faith, or abuse of his power, he will be regarded as holding the property only as security for his debt. *Lyon v. Jones*, 6 Humph. 533.

So a plaintiff, creditor, or mortgagee, may purchase at a sale made by a trustee, and the purchase-money, after deducting all commissions, expenses, and costs, may be discounted from, or applied to, the debt due such purchaser. *Murdock's case*, 2 Bland, 461, 468.

A *cestui que trust* may purchase at a sale of the trust estate; and does not become a trustee for other parties, without repayment to him of the purchase-money. *Walker v. Brungard*, 13 S. & M. 723.

But one trustee cannot purchase from another. *Case v. Abeel*, 1 Paige, 393; *Ringgold v. Ringgold*, 1 Har. & G. 11. See *Giddings v. Eastman*, 5 Paige, 561.

But, where one trustee purchases at the sale of another, such sale will not be wholly void for fraudulent acts of the seller, unless the purchaser is shown to be connected with them. *Beeson v. Beeson*, 9 Barr, 279.

Although a trustee cannot become a purchaser of the trust estate, there is no reason why he should not *occupy* it, if he accounts for the rents, and to the amount the Court may consider reasonable. *Root v. Yeomans*, 15 Pick. 495.

that, though a trustee may purchase the property levied on and sold at a sheriff's sale, at the instance of others, and will be entitled to reimbursement for his expenditures in the purchase; he cannot deprive the *cestui* of any benefit arising from such purchase.¹ It has been doubted whether the general rule applies, where, in case of a trust for creditors, a majority of them assent, or where the estate is sold under a decree in chancery, by an open bidding before the master. But a sale is not valid merely because it is judicial; more especially when made at the instance of the trustee himself. Nor because it is a public sale. So where, in a sale made by executors, one of them became a joint purchaser and afterwards sole owner; held, the land was still liable to be taken by creditors, though ratified by the heirs and devisees.²

34. As to *the time* at which a purchase made by the trustee must be disaffirmed; it is said, the *cestui que trust* "must not lie by to speculate upon events;"³ but disaffirm the sale in reasonable time, according to the circumstances of the case.⁴

35. The sale was made under a deed of trust in March, 1847, and the trustee, by his agent, became purchaser of the land for his own use. The *cestui que trust* had no notice of the sale, and it did not appear when she first discovered that the agent purchased the land for the trustee. In September, 1848, the agent sold and conveyed the land to A., and in September, 1850, the *cestui que trust* filed her bill to set aside the first sale. Held, that this was not an unreasonable delay; and, though she might have been present at the last sale, and made an offer for the land, she would not be considered as having acquiesced in this sale, unless she was aware that the trustee had violated his duty in making the first sale.⁵ But when a trustee, with the knowledge of his

¹ Spindler v. Atkinson, 3 Md. 409.

² Wiggins, 1 Hill's Cha. 354; Whelpdale v. Cookson, 1 Ves. 9; Bruch v. Lantz, 2 Rawle, 392; Campbell v. Pennsylvania, &c. 2 Whart. 53.

³ Ball v. Carew, 13 Pick. 31.

⁴ Andrews v. Hobson, 23 Ala. 219.

⁵ Mason v. Martin, 4 Md. 124.

cestui que trust, makes a conveyance apparently in derogation of the trust, and undisturbed possession is held, and improvements made, for fifty years, by the grantee and those claiming under him, no claim being asserted by the *cestui que trust*; it may be presumed that he, for a sufficient consideration, directed, or acquiesced in, the conveyance.¹ (a)

36. The sale of trust property to the trustee cannot be avoided against a *bonâ fide* purchaser or mortgagee.² Thus a debtor, being in failing circumstances, and owing to five of his creditors, severally, \$7,540, gave them therefor a judgment bond; and A., as their attorney, entered up the judgment, and issued an execution, upon which the real property of the debtor was advertised for sale. Three of the creditors attended the sale, in the absence of the other two, and agreed not to bid against each other, but to employ an agent to bid in the property, and to divide the profits of the purchase between them in proportion to their respective debts; and for this purpose they employed A., who bid in the property for \$625, which was less than one fifth of its cash value; and a few days thereafter he sold the premises for \$3,600, and divided the profits among the three creditors. Held, the purchase was fraudulent, as against the other two; but, being made to a *bonâ fide* purchaser, without notice, that both sales must stand; and the three creditors must account to the other two for their shares of the proceeds, in proportion to their several interests in the judgment.³

37. With regard to *the remedy* of the *cestui que trust*, in case of a purchase by the trustee, it has been held, that it

¹ Williams v. First Presbyterian, &c.
1 Ohio, 478.

² Robbins v. Bates, 4 Cush. 104.

³ Hawley v. Cramer, 4 Cow. 718.

(a) In Pennsylvania, a purchase of land by an administrator, at a sale of the estate of his intestate, if not actually fraudulent, cannot be avoided by the heirs, unless suit be brought within twenty-one years after the sale, or within ten years after they come of age, if they were then minors. Musselman v. Eshleman, 10 Barr, 394.

must be more particularly directed to the property itself than to the party who has committed the wrong ; it is rather *in rem* than *in personam*. Thus an agent, appointed to sell a mortgage, represented to his principal that he could get no more than a certain price for it, which was less than its real value, and bought it for that price. Held, the remedy of the principal was not an action for fraud, but a claim to annul the sale, or for an account for the true value.¹

38. On a bill to set aside the sale of an estate, on the ground of fraud, the plaintiff cannot give evidence of the relation of attorney and client at the time of the sale, with a view of raising an inference of fraud ; the fact not being stated or put in issue by the bill.²

39. A.'s interest in leasehold lands having been set up for sale on execution, C., his attorney, the real plaintiff in one of the writs, but not pressing the sale, attended ; and, having made the largest bid, he was declared the purchaser. He paid the purchase-money, which was not more than sufficient to satisfy the writs prior to his own, and the expenses. A. claimed the benefit of the purchase, alleging that C. bid as his agent, and purchased in trust for him, which C. denied, but offered to give up the purchase if A. would pay him the purchase-money and other demands he had on him. A. was not then able to raise the money, but after ten years,—during which C. dealt with the lands as his own,—he filed his bill, charging that C. bid for and purchased the land as his agent, in trust for him ; that C. said so at and after the sale in conversation with friends of A., and they, on that understanding, did not bid ; all of which C. positively denied in his answer. S., a witness for A., proved conversations between himself and C., as charged in the bill. Held, 1. That a decree, by which the bill was dismissed upon C.'s undertaking to release A. from all demands ; and a second decree by which the former was varied, and an issue directed to

¹ Thompson v. Hallet, 26 Maine, 141.

² Williams v. Llewellyn, 2 You. & Jer. 68.

ascertain the value of A.'s interest in the lands at the time of the sale ; were both erroneous.

2. That an inquiry as to such value was immaterial. The material question being, whether C. was acting on behalf of A. in bidding and purchasing, C. might take an issue to try that question ; but, if he declined, he should be declared a trustee for A.

3. That A.'s equity was not affected by the lapse of ten years, there being no acquiescence by A., and C. being aware of his rights.

4. That, if an attorney is not acting as attorney for his client on a particular occasion, he may throw off that character, and exercise his independent rights.¹ (a)

¹ Austin v. Chambers, 6 Cl. & Fin. 1.

(a) In illustration of the general principle stated in the text, we may refer to a few miscellaneous cases, some of which are not, strictly speaking, *purchases of real property*. In proof of the universality of the rule, it is said, equity will never permit a trustee to secure his own debt, not secured by the trust, by a combination with one claiming adversely to the *cestuis*. Irwin v. Harris, 6 Ired. Eq. 215.

So the reason of the rule is said to be, not that there *is*, but there *may be* fraud. Brothers v. Brothers, 7 Ired. Eq. 150.

The principle is often applied in connection with *mortgages* purchased or held by the trustee. Thus a trustee agreed to purchase a farm for the *cestui* from the proceeds of trust property. He bought the farm, giving a bond and mortgage for the price, but refused to pay them, and procured a foreclosure and sale by the mortgagee at a heavy loss. Held, he was liable for such loss. Green v. Winter, 1 John. Cha. 27.

Where a bank was bound to pay off and discharge a mortgage, so as to relieve the property of a third person from sale under a decree of foreclosure, and the cashier attended the sale as agent for the bank, and bid off the property on his own account ; held, equity would regard him as purchasing for the benefit of the bank, and that the purchase was improper, and should be set aside. Bank, &c. v. Torrey, 7 Hill, 260.

A trustee sold the property on credit, taking a bond and mortgage back, and afterwards repurchased part of the property, and gave credit for the amount on the bond. The sale being rescinded, held, the *cestui que trust* might elect to claim the property or the money. Sollee v. Croft, 7 Rich. Eq. 34.

So, where a trustee became the owner of land, on which was a mortgage belonging to the trust estate, cancelled the mortgage on the record, sold one third of the land, taking back a mortgage for the same amount as the former one, and executed a declaration of trust, acknowledging that he held it in trust in lieu of the former one; but the land included in the latter mortgage was greatly inadequate security; on a bill by the *cestui*, setting forth that these acts were done without his knowledge or consent, and that the original bond and mortgage had never been paid, a decree was made, establishing these securities as still valid, securing the rights of subsequent *bonâ fide* mortgagees, and directing a sale of the property, and payment by the trustee of any deficiency. So, where the holder of a mortgage assigned it in trust, for the benefit of children, and afterwards accepted a reassignment of it from the assignee in trust; held, he was accountable as trustee to the *cestuis*. So, where a trustee has borrowed money, and with it purchased other property, and added it to the trust, and repaid the borrowed money from the proceeds and profits of the trust property, the property thus purchased belongs to the beneficiary. *Wasson v. English*, 13 Mis. 176; *Butler v. Hicks*, 11 Sm. & M. 78; *Gilchrist v. Stevenson*, 9 Barb. 9; *Stuart v. Kissam*, 2, 498; *Whicote v. Lawrence*, 3 Ves. 740.

A testator died insolvent, in 1828, leaving a farm and house, and the plaintiff, his widow, as his executrix. She arranged with A., a relative, to buy in the farm when sold, and hold it, to be conveyed to her on payment of the purchase-money, on which she was to pay interest quarterly. In 1834, A. conveyed to one of the defendants, her step-son, who assented to the above arrangement. The plaintiff remained in possession till 1842, the property having greatly increased in value, when the step-son refused to convey, and conveyed a part to the other defendant. The agreement to convey was made at or before the sale, and, in consequence of it, the estate brought \$1,000 less than A. paid. The plaintiff had for some years neglected to pay the interest and paid none of the principal. The plaintiff files a bill in equity to compel specific performance of the agreement to convey to her, and set aside the conveyance from the step-son. Held, the agreement was not a mortgage, and did not create a constructive or resulting trust, but was merely executory; that, being made by an executrix with her relative, it was a fraud on heirs and creditors, a breach of trust, and against public policy, and therefore void against both defendants, the purchaser from the step-son being a purchaser with notice. *Tufts v. Tufts*, 3 W. & M. 456.

The general rule stated in the text is held to be applicable only to an *actually existing*, not to a *past* trust, or one with which the purchaser is not himself connected. It is said, "It would seem to impose an unnecessary hardship and disability upon him who had been a *cestui que trust*, to deprive him of the power of dealing with him who had been the trustee, but who had discharged himself or been released from his duty as trustee. Such

dealing would be good, if fair and honest." Per Putnam, J., *Ball v. Carew*, 13 Pick. 31-2.

One of two partners, in his own name and with his own funds, purchased in fee the premises on which the firm, under a lease, was carrying on business (after the term limited for the partnership had expired, but before actual dissolution.) The purchase was not fraudulent, but made without the knowledge or consent of the copartner, and with notice that he was treating for a purchase for partnership use, and was not any part of the firm's ordinary business. Held, the copartner could not claim the premises as partnership property. *Anderson v. Lemon*, 4 Sandf. 552.

A. mortgages land for security to B., his surety. A. then transfers to C., a creditor, all his remaining interest in the land, without the knowledge and not for the account of B., and afterwards transfers such interest to B. Held, in the absence of fraud, B.'s purchase was not invalid, as made by a trustee; that relation having ceased by A.'s transfer to C. *Ball v. Carew*, 13 Pick. 28.

So a trustee may become a purchaser, at a sale made by virtue of proceedings prior to his becoming such. Thus the assignees of an insolvent may purchase land sold on execution under a mortgage prior to the assignment. *Fisk v. Lacher*, 6 W. & S. 18.

The circumstance that the principal or *cestui que trust* has not relied upon the party confidentially employed, but upon the judgment of a third person mutually referred to, has been held to render the transaction valid. Bill to set aside the lease of a farm granted to a steward by his employer. It appeared that the lease was for a term longer than was usual on the estates, and was granted at the solicitation of the steward, on an agreement made before the subsisting lease had expired, and at a rent lower than was offered to the steward on behalf of the occupying tenant; but also that the rent to be paid had been fixed by a surveyor named for that purpose by the employer, and on a valuation made in the surveyor's usual manner, and that the offer of a higher rent was known to the employer before he executed the lease. Bill dismissed, with costs. *Selsey v. Rhoades*, 2 Sim. & Stu. 41.

The rule does not apply, unless the property purchased really as well as nominally belongs to the *cestui*. Thus, if the guardian or trustee for an infant heir or devisee, the real title being in a third person, buy this title, this shall not be a trust for the infant. *Lesley's case*, 2 Freem. 52.

The general principle stated in the text has been applied with strictness to *assignees of bankrupts*. Thus the assignees of a bankrupt were removed, on the ground that one of them had purchased under the commission, for himself. A resale was directed, and the purchaser to account for a profit gained by him upon a resale of part. Decreed to be a trustee for the original vendor as to the sums produced by such second sale. *Fox v. Mackreth*, 2 Bro. C. C. 400.

So an assignee, having thus purchased, was held a trustee of the profit upon a resale; in the first instance for an equitable mortgagee by possession of the deeds, although he had delivered them up on receiving the produce of the first sale. *Ex parte Morgan*, 12 Ves. 6.

So, if an assignee purchase part of the bankrupt's estate, and improve, the estate must be resold, and put up at the price given by the assignee, adding the sum laid out in improvements. *Hewit*, 2 Mont. & Ayr. 477.

A common agent or solicitor in court, employed on behalf of the creditors of the estate of a bankrupt in Scotland, may be considered in the nature of a trustee. A purchase, therefore, by him of any part of the bankrupt's estate may be set aside; and at all events will be so, if there appear any circumstances of improper or negligent conduct. *York, &c. v. Mackenzie*, 8 Bro. P. C. 42.

Where a sole assignee wishes to bid, for the benefit of the estate, he must be removed, or a *quasi* co-assignee appointed to protect the estate. *Ex parte Molineux*, 2 Mont. & Ayr. 245.

An assignee desirous of purchasing must first obtain the consent of the creditors, and then petition, and serve the other assignees, and also the bankrupt, with the petition. *Ex parte Bage*, 4 Madd. 459.

The Court will not confirm such purchase made without leave, because a meeting of creditors has consented. *Ex parte Thwaites*, 1 Mont. & A. 323.

The mortgagee of a bankrupt's estate may be allowed, on motion, to bid for it. *Ex parte Marsh*, 1 Madd. 148.

And the Court will not rescind such purchase, though made without leave of Court. *Ex parte Ashley*, 1 Mont. & Ayr. 82.

So, a mortgagee having bid without leave, an order to bid *nunc pro tunc* was made. *Ex parte Pedder*, 1 Mont. & Ayr. 327.

A mortgagee, with power of sale, himself put up the premises for sale, and then applied for leave to bid. Held, he could not be permitted, unless he waived the power, and had the property sold under the order of commissioners. *Ex parte Davis*, 1 Mont. & Ayr. 89.

Similar rules have been applied in other cases, analogous to proceedings in bankruptcy. Thus, where a trustee for sale of lands for payment of debts pays to the value of the lands, he thereby becomes a purchaser himself. *Lambert v. Bainton*, 1 Cha. Ca. 199.

So a purchase under a trust for payment of debts by the trustee, as agent for his father, both creditors, in partnership, was established under the circumstances, particularly that the *cestui que trust* had full information, and the sole management, making surveys, settling the particulars, fixing the prices, &c. *Coles v. Trecothick*, 9 Ves. 234; 1 Smith, 233.

W. being indebted to C., agreed by deed to convey his estate to C. upon trust to sell the same, and to pay off certain debts of W. due to other persons, and then his own debt, and to pay over the surplus, if any, to W.

No conveyance was executed. C., being afterwards in possession, under a *fi. fa.* issued on a judgment, upon a warrant of attorney given by W., agreed with W.'s agent to purchase the estate. W. ratified the contract, but subsequently impeached it as one made by a trustee for his own benefit, and against the interest of the *cestui que trust*. Held, that C. was not a trustee for W., but was a creditor, holding a security for his debt, and that the contract of sale was valid. *Waters v. Groom*, 11 Cla. & Fin. 684.

A trustee, who has purchased the trust property and sold it at a profit, and is compelled by a suit in equity to refund that profit, will not, except in case of moral fraud, be charged with costs. *Baker v. Carter*, 1 You. & Coll. 250.

But, where trustees for sale purchased through a trustee, at an undervalue, though without fraud, and by auction; and the *cestuis* were infants, incapable of discharging the trustees; the purchase was set aside, with costs. *Sanderson v. Walker*, 13 Ves. 601.

The following was a form of decree against a trustee, purchasing at an alleged undervalue, and making permanent improvements: "It is ordered that the trustee shall be declared purchaser of the premises at the present value; which is not to be less than the price of the original purchase, with the permanent improvements. But, if the Court shall ultimately decide that he ought to be allowed the value of the improvements, or any part thereof, then so much of the purchase-money as relates to the improvements is to be allowed as already paid by him." *Williamson v. Seaber*, 3 You. & Coll. 717.

So a trustee for sale for payment of debts, who purchased, himself, by taking undue advantage of the confidence reposed in him by the plaintiff, and, previous to the completion of the contract, sold at a highly advanced price; was discharged from the purchase only conditionally, in case the resale should produce more. *Ex parte Reynolds*, 5 Ves. 707.

CHAPTER XXIII.

NOTICE.

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| 1. General principles as to notice. | 10. Notice, <i>to</i> whom given; agents, |
| 4. <i>Express</i> and <i>implied</i> notice. | solicitors, &c. |
| 5. Notice sufficient to demand <i>inquiry</i> . | 13. <i>By</i> whom. |
| 6. Implied notice, chiefly as arising
from possession under an unrecorded
deed. | 14. Notice, in cases of lease and ten-
ancy.
22. <i>Lis pendens</i> . |

1. HAVING in the foregoing chapters considered the causes, by which a contract for the sale and purchase of lands may be avoided as between the parties themselves; we proceed to inquire, under what circumstances a contract binding upon the parties is valid or void, *as to third persons* having an interest in the property bargained for. This question commonly turns upon the point of *notice*; it being the general rule of equity, where questions of this nature usually arise, that a purchaser *with notice*, or one informed of an existing contract in reference to the property purchased, although it have not been actually conveyed; takes the property subject to that contract, and will be compelled to execute it. In the English law, the subject of notice has given rise to very numerous and various questions, and very subtile distinctions, (a) connected more particularly with

(a) The English Equity Reports abound with cases, which turn upon the effect of express or implied notice; while American cases of this description are comparatively rare, except as connected with the single point of *registration*; showing that the subject does not require to be exhibited in all its complicated details, in a practical American treatise. Moreover, a large proportion even of the American cases relate, not to mere *contracts*, but to *executed conveyances*, which do not fall within the plan of the present work. The collateral topics of *Fraud*, *Estoppel*, *Trust*, *Mortgage*, and others equally

actual or constructive *fraud*; but in the United States these have become to a great extent unimportant and inapplicable, by reason of the *registration system* which universally prevails, and by which the *recording* of an instrument according to law is generally deemed an equivalent or substitute for actual notice, as to all the world. We propose, therefore, only to state a few of the leading principles, which seem to be well established by the weight of authority. (a)

copious, into all of which *Notice* enters, as a leading element, would lead to inquiries of great interest, but foreign from the design, and wholly inconsistent with the limits, of this book.

(a) The rules as to notice are held to apply only for the protection of the prior equitable rights of third persons against subsequent purchasers, claiming adversely; not to controversies between the vendor and purchaser. *Champlin v. Laytin*, 6 Paige, 189.

It is said, "Valid transactions, as between the parties, may be fraudulent by reason of covin, collusion, or confederacy to injure a third person; for instance, A. buys an estate from B. and forgets to register his purchase-deeds; if C., with express or implied notice of this, buys the estate for a full price, and gets his deeds registered, this is fraudulent, because he assists B. to injure A." Per *Ld. Mansfield*, *Worseley v. De Mattos*, 1 Burr. 474.

So it was remarked by another eminent Judge: "Taking of a legal estate after notice of a prior right, makes a person a *malâ fide* purchaser. This is a species of fraud, and *dolus malus* itself; for he knew that the first purchaser had the clear right of the estate, and after knowing that, he takes away the right of another person by getting the legal estate. And this exactly agrees with the definition of the civil law of *dolus malus*. Dig. lib. 4, tit. 3, lex 2. Fraud or *mala fides*, therefore, is the true ground on which the Court is governed in cases of notice. Per *Ld. Hardwicke*, *Le Neve v. Le Neve*, 3 Atk. 654.

So it has been said to be mischievous to consider the *registry* as notice to all intents. *Bushell v. Bushell*, 1 Scho. & Lef. 103.

Even the familiar maxim, "*ignorantia legis neminem excusat*," has been dispensed with in reference to registry. Thus a statute was made in Ireland, that all leases not registered by such a day should be void. The respondent, who lived in the remotest part of Ireland, not having notice of the Act, did not register; whereupon another lease was made to one who had notice of the first, and registered, and ejectment brought upon it; but the respondent was relieved. *Forbes v. Deniston*, 4 Bro. P. C. 189.

Annuity granted out of lands in Middlesex, and without registry. One hav-

2. It is held that if A., after agreeing to sell to B., sells and conveys to C., who, before he purchased, had been told "that A. had sold the premises to B.; that B. had purchased it, and had an article for it;" C. does not stand in the situation of a *bonâ fide* purchaser without notice, entitled to the special favor of the Court. Having purchased the title of A., with notice of at least some claim on the part of B., he stands in no better situation than A. himself, and must stand or fall by the merits of the case, as it exists between A. and B.¹ (a) So a parol agreement for a purchase, and possession delivered, was decreed to be performed against a subsequent purchaser with notice, who had a conveyance and paid his money.²

3. A purchaser with notice, from one without notice, is held a *bonâ fide* purchaser.³ So a *bonâ fide* purchaser, for valuable consideration, is protected under the statutes of 13 and 27 Eliz., whether he purchases from a fraudulent grantor or grantee, and whether the first deed was made to defraud subsequent creditors or subsequent purchasers.⁴

4. Notice is either *express and actual* or *implied and constructive*; (b) but, it is said, there is no difference between actual and constructive notice in its consequences;⁵ and the

¹ King v. Morford, 1 Saxt. Ch. 274.
But see Bradbyn v. Ord, 2 Atk. 241.

² Butcher v. Stapley, 1 Vern. 363.

³ Lowther v. Carlton, 3 Atk. 241.

⁴ Hood v. Fahnestock, 8 Watts, 489.

⁵ 2 Sugd. 537.

ing notice of this grant purchases the inheritance. The grantee shall have his annuity against the purchaser. Chivall v. Nicholls, Stu. 664. See Beatniff v. Smith, 1 Eq. Ca. Abr. 357, pl. 11; Blades v. Blades, 1 Eq. Ca. Abr. 358, pl. 12; Hine v. Dodd, 2 Atk. 275; Le Neve v. Le Neve, 3 Atk. 646; Sheldon v. Cox, Ambl. 624; Jolland v. Stainbridge, 3 Ves. 478.

(a) Upon the same principle, where one purchases an estate, pays part of the price, and gives bond to pay the residue, subsequent notice of an equitable incumbrance before such payment is sufficient. Tourville v. Naish, 3 P. Wms. 307; Story v. Windsor, 2 Atk. 630; More v. Mayhew, 1 Cha. Ca. 34; 2 Freem. 175, pl. 235. So, notice of an incumbrance after payment, but before a deed is executed. Wigg v. Wigg, 1 Atk. 384.

(b) Express notice of a deed is equivalent to recording. Knotts v. Geiger, 4 Rich. 32; Draper v. Bryson, 17 Mis. 71.

terms *actual* and *constructive* are said to be indefinite with reference to notice.¹ *Actual* notice is such as men usually act upon in the ordinary affairs of life; not positive and certain knowledge (in reference to a prior deed) of its existence, as by seeing it, or being informed of it by the grantor himself.²

5. But, beyond this, it is held that any notice is sufficient, which should put a party *on inquiry*.³ (a) Information, which makes it the duty of a party to inquire, and shows where such an inquiry may be effectual, is notice of all facts, which might be thereby ascertained, after a reasonable time for making the inquiry.⁴ No purchaser is at liberty to remain intentionally ignorant of facts relating to his purchase, within his reach, and then claim protection as an innocent pur-

¹ *Jordan v. Pollock*, 14 Geo. 145.

soll, 15 Penn. 343; *Smith v. Low*, 1

² *Curtis v. Mundy*, 3 Met. 405.

Atk. 489.

³ *Gibbes v. Cobb*, 7 Rich. Eq. 54; *Rupert v. Mark*, 15 Ill. 540; *M'Gehee v. Gindrat*, 20 Ala. 95; *Sergeant v. Inger-*

⁴ *Carr v. Hilton*, 1 Crut. 390; *Ringgold v. Bryan*, 3 Md. Ch. 488; *Stockett v. Taylor*, 3 Md. Ch. 537.

(a) Where the creditor of a publican in London took from the latter a legal mortgage of copyhold, knowing that the publican was indebted to his brewers, and also knowing the ordinary practice in London of publicans' depositing their leases with their brewers by way of mortgage; held, such notice as would have put a prudent man on further inquiry; and that the equitable security had priority. *Whitbread v. Jordan*, 1 You. & Coll. 303.

It is to be observed, that some authorities exact more stringent express notice than that stated in the text. Thus it is said, to show express notice the proof must be "clear and unequivocal." Per *Wilde, J.*, *M'Mechan v. Griffing*, 3 Pick. 154. So it is said, "*Suspicion* of notice, though a strong suspicion, is not sufficient to justify the Court in breaking in upon an act of parliament." Per Lord Hardwicke, *Hine v. Dodd*, 2 Atk. 275; 6 Barb. 60. So it has been held, that notice of an unrecorded deed must be proved *beyond all reasonable doubt*. *Rogers v. Wiley*, 14 Ill. 65. So, that it must be *direct and positive* or *implied*, not merely sufficient to put the party on inquiry. Nor is a suspicion of notice sufficient. *Fort v. Bunch*, 6 Barb. 60.

The purchaser said, in a conversation with a third person, about the time of the purchase, that "he had understood that (his grantor) had fooled away the lot, and had sold it several times, and did not consider it worth his trouble to look about it." Held, this conversation did not justify an inference of notice. *Jackson v. Given*, 8 Johns. 107.

chaser.¹ Thus, where a person other than the grantor is in possession, it is the purchaser's duty to inquire into the title, and the presumption of law is, that upon such inquiry he ascertains the true state of the title; unless he makes such inquiry, a fraudulent intent in making the purchase is presumed.² (a) So notice of a judgment against a vendor is sufficient to put a purchaser upon further inquiry. Hence, if instead of a judgment the party has a specific incumbrance on the property, the purchaser will be bound by it.³ But notice to a purchaser of judgments against the vendor, whose estate is limited to uses to bar dower, does not prevent the purchaser from taking the estate free from the judgments, under an exercise of the power reserved to the vendor.⁴ So notice to a purchaser that there is a lease is notice of its contents.⁵ So notice of possession by a tenant is notice of his interest.⁶ So, of his interest, either as tenant, or further, by an agreement to purchase.⁷ So a purchaser, with notice of the tenant's possession of *part* of the estate, has constructive notice of the whole of the tenant's interest.⁸ So, although notice to a purchaser in one transaction will not affect him in an independent subsequent one; notice of a deed is notice of the whole of its contents, so far as they can affect the transaction in which such notice is acquired.⁹

6. The class of cases which has given rise to the most numerous questions as to notice, is that of *implied* or *con-*

¹ Jenkins v. Eldredge, 2 Story, 181.

² McLaughlin v. Shepherd, 32 Maine, 143.

³ Taylor v. Baker, Dan. 71.

⁴ Eaton v. Sanxter, 6 Sim. 517.

⁵ Hall v. Smith, 14 Ves. 426.

⁶ Heirn v. Mill, 13 Ves. 114.

⁷ Daniels v. Davison, 16 Ves. 249.

⁸ Powell v. Dillon, 2 Ball & Beat. 416.

⁹ Hamilton v. Royse, 2 Scho. & Lef. 327.

(a) But constructive notice of title is not sufficient to postpone the owner of land to a purchaser having equal notice, because the owner, knowing of the intended sale, permits it without objection; unless there be actual notice of his right, or positive acts inducing the purchase. Paul v. Squibb, 12 Penn. 296.

constructive notice, usually arising from the occupation and improvement of the land, by one not having a perfect legal title. On the general subject of implied notice, involving in part, however, what has been already suggested with regard to a certain kind of express notice ; (a) it is held that the doctrine of constructive notice applies in two cases ; first, where the party charged has notice that the property in dispute is incumbered, or in some way affected, in which case he is deemed to have notice of the facts and instruments, to a knowledge whereof he would have been led by due inquiry after the fact which he actually knew ; and, secondly, where the conduct of the party charged evinces that he had a suspicion of the truth, and wilfully or fraudulently determined to avoid receiving actual notice of it.¹

7. But, as has been stated, the terms *implied notice* are commonly applied to *the inference arising from possession of the land*. Our plan does not lead to a statement of the numerous cases of this class, in which a subsequent recorded conveyance is relied upon on one side, and a prior unrecorded conveyance on the other ; the second grantee being alleged to have implied notice of the former deed, growing out of the occupation of the first. The questions arising from a mere *sale* of the land, not consummated by a conveyance, have been comparatively rare ; but the principle involved is substantially the same ; and indeed a conveyance not registered bears a very close analogy to a mere executory contract. (b) Thus it has been held, that, where a

¹ Jones v. Smith, 1 Hare, 43.

(a) Meaning by *express* notice, that which is expressly communicated, though not in such a way or from such a source as to be *absolute and positive*, in contradistinction to that which is to be inferred from facts and circumstances. Such is the notice, which is held sufficient to put a party on *inquiry*. See Howorth v. Deem, 1 Ed. 351.

(b) The defendant, under the belief that he had the fee-simple in an estate, subject to a life interest in his mother, who really was the owner in fee, conveyed all his interest to trustees for the benefit of his creditors, with

parol sale of lands has been made, money paid, and possession delivered, the contract is good between the parties, but not against a *bonâ fide* purchaser, without clear evidence of notice to him, either actual or legal; that legal notice exists only where there is a violent presumption of actual notice; and that undisturbed possession by the equitable owner has generally been considered legal notice; but it must be a clear, unequivocal possession. Hence, where A. bought by parol from B. a corner of B.'s tract, paid for it, was put into possession, and had buildings erected, but at the same time had no survey of the part, or other admeasurement to reduce it to certainty, and on B.'s own part there was a forge, dwelling-house, grist and saw mill, and buildings for the workmen, which, with A.'s building, might strike the eye as one establishment; the possession of A. was held not to be legal notice of his title to a purchaser at sheriff's sale, under a judgment against B.; but the equity of such purchaser would prevail; particularly if A. gave no actual notice of his title, when he probably knew of the judgment, execution and sale.¹

8. Under an agreement of exchange between A., who held lands under a college lease, and B., the owner of an adjoining estate, B. occupied part of the college lands, and A. had occupied, along with the residue of the leasehold, part of B.'s estate. A. having become bankrupt, the college leasehold was sold, and was described in the particulars of sale as "late the residence of A." Held, the purchaser was not to be considered as having implied notice of the exchange, and had a right to recover that portion of the leasehold which was in B.'s occupation.²

¹ Billington v. Welch, 5 Binn. 129, 131.

² Miles v. Langley, 1 Russ. & Myl. 39; 2 Ibid. 626.

covenants for title and for further assurance. Upon her death the fee descended to him. Held, although not a valid *conveyance*, the transaction amounted to a contract for sale, which the defendant was in equity compellable to execute. Smith v. Baker, 1 You. & Coll. 223.

9. In case of an unrecorded prior conveyance, it has been sometimes held, that the possession of the grantee is of itself constructive notice, equivalent to that derived from registration. (a) But the prevailing doctrine is now otherwise. Thus it is said,¹ "the doctrine in the English law of constructive notice of the title of the lessee, or party in the possession, is not favored in the American Courts." So Judge Story says, "The American Courts seem indisposed to give effect to this doctrine of constructive notice from possession, even in its most limited form. The English cases admonish Courts of Equity in this country, where the registration of deeds, as matters of title, is universally provided for, not to enlarge the doctrine of constructive notice, or to follow all the English cases on this subject, except with a cautious attention to their just application to the circumstances of our country, and to the structure of our laws."² So it is held in Massachusetts, that, although open and notorious possession and improvement of real estate has generally been held sufficient constructive notice of a deed; yet the evidence must have been such as to render the inference not merely probable, but necessary and unquestionable. Thus it was held not to arise, where an owner of land purchases land adjoining and not separated by a fence, and principally woodland, repairs the fence, pastures cattle, and sells trees.³ And it has since been held, as a general rule, that open and visible possession, cultivation, and the making of permanent improvements are insufficient notice

¹ 4 Kent, 179, n.

³ M'Mechan v. Griffing, 3 Pick. 149.

² Flagg v. Mann, 2 Sumn. 291, 555, See Butler v. Stevens, 26 Maine, 484.
556. But see Matthews v. Demerriett,
22 Maine, 312.

(a) In Illinois, a late case so decides. *Rupert v. Mark*, 15 Illin. 540. See *Mill v. Hill*, 22 Eng. L. & Eq. 20.

It has been recently held in Michigan, that, although the possession and improvements of a purchaser do not constitute *actual notice* of an unrecorded deed, within the terms of the statute; still they make such an *adverse possession*, as will render the subsequent conveyance void at common law. *Hubbard v. Smith*, 2 Mich. 207.

of an unrecorded deed.¹ (a) So it has been held in New Hampshire, that, in order to have this effect, the possession must be exclusive and unequivocal—a mixed possession is not sufficient.² (b)

10. Notice to one, who purchases or sells for another, affects the latter.³ (c) So notice to a solicitor is actual

¹ *Pomroy v. Stevens*, 11 Met. 244.

² *Bell v. Twilight*, 2 Fost. 500.

³ *Merry v. Abney*, 1 Cha. Ca. 38;

1 Eq. Ca. Abr. 330; *Maddox v. Maddox*, 1 Ves. 61; *Sheldon v. Cox*, Amb. 624.

(a) Where a deed is made and recorded, with a defeasance back, which is not recorded, the continued possession of the grantor is not implied notice of such defeasance. *Hennessey v. Andrews*, 6 Cush. 170.

(b) It is held, that even registration is not constructive notice, unless authorized by law; as in case of an unacknowledged deed. *Johns v. Rear-don*, 3 Md. Ch. 57. Or an unsigned deed; although the signature be subsequently registered, but unseasonably. *Shepherd v. Burkhalter*, 13 Geo. 443. Acc. *Dennis v. Loftin*, 6 Tex. 489; *Brown v. Budd*, 2 Cart. 442. See *Delane v. Moore*, 14 How. U. S. 253. So registry of a defective deed is void. *Pope v. Henry*, 24 Verm. 560. In order to maintain a title against a prior unrecorded deed, the purchaser must prove payment of a valuable consideration. The recitals in his deed are not evidence of such payment. *Nolen v. Gwynn*, 16 Ala. 725. The rule, that a purchaser for valuable consideration, without notice, is protected by the legal estate, applies where his title is impeached, not only by some secret act of the vendor or those under whom he claims, but by the falsehood of a fact of title asserted by the vendor or those under whom he claims; provided such title is clothed with possession, and the falsehood could not have been discovered by reasonable diligence. *Jones v. Powles*, 3 Myl. & Kee. 581.

A defendant, stating by answer a purchase for valuable consideration without notice, shall not be compelled to answer further. And equity will not take the least step against such purchaser, not even to perpetuate testimony against him. *Jerrard v. Saunders*, 2 Ves. 454.

Bill by tenant in tail, in possession under a marriage settlement, for discovery and delivery of title-deeds. Plea, mortgage by the tenant for life, alleging himself to be seised in fee, and in possession of the premises and deeds as apparent owner. Plea allowed; upon the rule that equity gives no assistance against a purchaser for valuable consideration without notice. *Wallwynn v. Lee*, 9 Ves. 24. But, if a person will purchase with notice of another's right, giving a consideration will not avail him. *Mead v. Orrery*, 3 Atk. 238.

(c) Because otherwise, as is said, a man who had a mind to get another's

notice to the client.¹ Thus A., having notice of an incumbrance, purchases in the name of B., who, however, neither employed A., nor knew that the purchase was to be made. A. then agrees that B. shall be the purchaser, and B. accordingly pays the purchase-money, without notice of the incumbrance. Held, that B., by approving the purchase, made A. his agent, *ab initio*, and therefore was affected with the notice to A.² So mere *implied* notice to an agent binds the principal.³ But the rule, that a purchaser is in equity chargeable with constructive notice of the contents of a deed, which came to the knowledge of his agent in the investigation of the title, does not apply as between the vendor and the purchaser; it applies only as between the purchaser and third persons having prior equitable rights.⁴ So A. agrees to take a lease, but, previous to signing the articles, has notice that B. has a prior agreement for a lease, and procures the lease to be granted to his son. Held, this notice affected the son, and that he should deliver up the possession.⁵

11. If the same person is agent both for the vendor and purchaser, or is himself vendor and agent for the purchaser, whatever notice he may have will affect the purchaser.⁶ Thus a purchaser, having employed the vendor's agent, who had notice of an incumbrance, was charged with notice, though the purchase was made under the sanction of the Court, and an infant was interested in it.⁷ So, after the com-

¹ Tunstall v. Trappes, 3 Sim. 301.

⁵ Coote v. Mammon, 5 Bro. P. C. 355.

² Jennings v. Moore, 2 Vern. 609.

⁶ Dryden v. Frost, 3 Myl. & Cra. 670;

³ Atty.-Gen. v. Gower, 3 Eq. Cas. Abr. 685, pl. 11.

Majoribanks v. Hovenden, 6 Ir. Eq. 238.

⁴ Champlin v. Laytin, 18 Wend. 407.

⁷ Toulmin v. Steere, 3 Mer. 210.

estate might shut his own eyes, and employ another to treat for him, who had notice of a former title, which would be a manifest cheat. Attorney-General v. Gower, 3 Eq. Ca. Abr. 685, Pl. 11. Notice to an attorney or agent is not to be considered as implied or constructive notice merely, which is properly referable to something that a party or his agent ought, if reasonable diligence had been used on his behalf, to have acquired a knowledge of, but which possibly neither he nor his agent ever did know or acquire any knowledge of. Lenehan v. McCabe, 2 Ired. Eq. 342.

mencement of a treaty for the sale of an estate by A., and the purchase of it by B., A. agreed to give C. a mortgage as security for an antecedent debt, and notice of the agreement was given to the solicitors of B. The treaty for the sale afterwards ceased for upwards of five years, during part of which time the suit of an adverse claimant was pending. A. then died, and B. purchased the estate at a lower price from his heir and devisee, and mortgaged to D. The same solicitors were concerned for B., from the commencement of the treaty until the final purchase, and for D. in the business of the mortgage. Held, B. and D. had constructive notice of the agreement with C., and the estate in their hands was subject to the lien of C., for the amount agreed to be secured by the proposed mortgage.¹

12. As notice, in order to affect a purchaser himself, should be confined to *the same transaction*;² *à fortiori* notice to an agent or counsel, who was employed in the thing by another person, or in another business, and at another time, is no notice to his client, who employs him afterwards.³ Thus where, by a transaction foreign to the business in hand, a counsel or attorney, employed to look over a title, has notice, that shall not affect the purchaser.⁴ So, though the agent acted as attorney for the vendor and vendee.⁵ Otherwise, where one transaction is closely followed by, and connected with, another; or where it is clear that a previous transaction was present to the mind of a solicitor, when engaged in the subsequent one.⁶ So where the former transaction is so recent, or so closely connected with the latter, that it must be presumed that the agent remembered it.⁷

13. To constitute a binding notice, it must be given by

¹ Fuller v. Bennett, 2 Hare, 394.

² Warrick v. Warrick, 3 Atk. 290.

³ Worsley v. Scarborough, 3 Atk. 392.

⁴ Lowther v. Carlton, 2 Atk. 241; Preston v. Tabbin, 1 Vern. 286; Fitzgerald v. Fauconberge, Fitzgib. 297; Warrick v. Warrick, 3 Atk. 291; Steed v. Whitaker, Barnard. 220; Hine v.

Dodd, 2 Atk. 275; Ashley v. Baillie, 2 Ves. 368.

⁵ Mountford v. Scott, 3 Mad. 34; Turn. & Russ. 274.

⁶ Hargreaves v. Rothwell, 1 Kee. 154.

⁷ Majoribanks v. Hovenden, 6 Ir. Eq. Rep. 238; Lenehan v. McCabe, 2 Ibid. 342.

one interested in the property, and in the course of the treaty for the purchase. (*a*) Vague reports from persons not interested in the property will not affect the purchaser's conscience, nor will he be bound by notice in a previous transaction which he may have forgotten.¹ Thus one person came to another, who was about to purchase a house, and told him to take heed how he bought it, for the vendor had nothing in it, but upon trust for A.; and another person came to him, and told him it was not so, for the vendor was seized of the land absolutely. Held, although the first information was correct, it was not legal notice.² So land given to charitable uses was intended to be sold by Act of Parliament; and, when the bill was read in Parliament, it was declared that the land was thus chargeable, and an offer made otherwise to assure the use. The bill not passing, the land was afterwards sold to a member who took part in the debate. Held, not legal notice.³

14. Questions of notice often occur in reference to the rights of landlord and tenant, and the purchase of leasehold interests.

15. General notice to a purchaser, that there are leases, is notice of all their contents. Thus a purchaser, being told part of the estate was in possession of a tenant, was held bound by the lease.⁴ So the possession of a tenant, even of part of the estate, is notice to a purchaser of the actual interest he may have, either as tenant, or further, by an agreement to purchase.⁵

16. Bill for specific performance. A tenant, being about to marry, requested his landlord to substitute as *cestui que vie*

¹ 2 Sugd. 537-8.

³ 2 Sugd. 538.

² *Wildgoose v. Weyland*, Goulds. 147, Pl. 67; *Cornwallis's case*, Toth. 254.

⁴ *Taylor v. Stibbert*, 2 Ves. 437.

⁵ *Daniels v. Davison*, 16 Ves. 249; *Powell v. Dillon*, 2 Ball & B. 416.

(*a*) It is held, that a notice *in the name of nobody* is insufficient. *Rogers v. Hoskins*, 14 Geo. 166. So it is said, flying reports are many times fables, and not truth; and, if admitted for sufficient notice, the inheritance of every man might easily be slandered. *Wildgoose v. Weyland*, Goulds. 147, pl. 67.

in his lease, in place of an old life, the name of the plaintiff, his intended wife ; which the landlord, by letter, promised to do ; and, upon the faith of such promise, the marriage was had, and the premises settled upon the wife. The landlord being dead, the wife brings this bill against the defendant, a purchaser from the landlord ; who was deemed under the circumstances to have had notice of the agreement. Decree for the plaintiff.¹

17. A tenant for life having granted leases for lives under a power, and bound himself upon the dropping of a life to grant a new lease, with the same provision for renewal on the death of any person to be named in any future lease, and afterwards joined in a sale ; held, though the power was exceeded, yet, if a life drops in the life of the lessor, the purchaser, having notice, must specifically perform, by granting a new lease with the same provision.²

18. The lord of a West-country manor (his tenants refusing to renew) makes a lease of the premises to his daughter for ninety-nine years, and afterwards sells the manor to one who has notice of the lease, but has security that the daughter, when at age, should surrender. The daughter was decreed to have the benefit of the lease.³

19. A. made an equitable mortgage to B., and afterwards agreed to lease to C., who had notice of the prior charge. A. became bankrupt before the lease was executed, and on the petition of B. an order in bankruptcy was made, under which the premises were sold to B., and he retained the amount of his mortgage out of the purchase-money. Held, on a bill filed by C. for specific performance of the agreement, that B., having become the purchaser, and thereby united his equitable mortgage with the equity of redemption, was bound to perform the agreement.⁴

20. An agent may take a lease from his principal, if prepared to prove that full information has been imparted to

¹ Crofton v. Ormsby, 2 Scho. & Lef. 583.

² Taylor v. Stibbert, 2 Ves. 437.

³ Jennings v. Selleck, 1 Vern. 467.

⁴ Smith v. Phillips, 1 Kee. 694.

the latter, and that the contract has been entered into with perfect good faith. And the same principle applies to one who takes an assignment of a lease from the agent of the lessor, with notice of the agency. If the lease cannot be upheld by the agent, neither can it be by the purchaser.¹

21. Demise by a copyholder for one year, and, at the end of that term, from year to year, for the term of thirteen years more, if the lord will give license; and so as there shall be no forfeiture, with the usual covenants in a farm lease. The license not being granted, held, it was a condition precedent, and there was no lease at law further than from year to year; also, that no equity arose from the circumstance, that the lord purchased his tenant's interest with notice of the demise, and an express exception of all subsisting leases, or agreements for leases.²

22. A purchase *pendente lite*, though without actual notice, and for valuable consideration, shall be set aside. "*Pendente lite nil innovetur.*" Though this rule of equity is said to be hard, yet it is in imitation of the common law, where in a real action, if the defendant alienes pending the writ, the judgment will overreach the alienation. Thus acts of the Court, as the commitment of a wardship, and in a cause depending, are to be taken notice of by every one at his peril.³ So, an heir at law being as much at liberty to invalidate the will, as the devisees to establish it; a suit for that purpose is to all intents a *lis pendens*.⁴ So, in case of a devise of lands charged with payment of debts; if the devisee sell, pending a suit by creditors for sale and payment of debts, such alienation is void.⁵ (a)

¹ Molony v. Kernan, 2 Dru. & War. 31.

³ Herbert's case, 3 P. Wms 117.

² Lufkin v. Nunn, 11 Ves. 170. See Doe v. Lufkin, 4 E. 221.

⁴ Garth v. Ward, 2 Atk. 174; 3 Barnard, Rep. Cha. 450.

⁵ Walker v. Smalwood, Ambl. 676.

(a) Whether a subpœna served, and a bill filed, is a *lis pendens* against all persons, *qu.* The former alone is not. Anon. 1 Vern. 318. But, where a Register Act directed, that no judgment should affect lands, but from the

23. It has been held, that a *decree* is not implied notice to a purchaser, after the cause is ended; but it is the pendency of the suit that creates the notice.¹ (a) As it is a transaction in a sovereign court of justice, it is supposed all people are attentive to what passes there.² So, where the defendant, having notice of a decree to which he was no party, paid money contrary to that decree; ordered, that he should pay the money over again.³

24. After a decree, the bar to the right of reviving the suit, which arises from delay, depends altogether on the dis-

¹ Worsley v. Scarborough, 3 Atk. 392.

² Ibid.

³ Harvey v. Montague, 1 Vern. 57, 122.

time of registry of such judgment, a purchaser with notice of an unregistered judgment was still held to be bound by it. Tunstall v. Trappes, 3 Sim. 301.

(a) In case of a real purchase *pendente lite*, the plaintiff is to be held to strict proof. And, if any flaw at the hearing be on the plaintiff's side, the Court will not let him amend; but, if the purchase *pendente lite* be fraudulent, and to elude the justice of the Court, it ought to be highly discountenanced. Sorrel v. Carpenter, 2 P. Wms. 482.

A conveyance made *pendente lite* is not wholly void. The rule merely means that the conveyance does not vary the rights of the parties to the suit; that they are not bound to take notice of the title acquired under it; but, with regard to them, the title is to be taken as if it never existed. 2 Story Eq. § 908; Hopkins v. McLaren, 4 Cow. 678.

So it is held, that the effect of the maxim, "*pendente lite nihil innovetur*," is limited to the rights and parties in that suit. It does not absolutely annul a conveyance *pendente lite*. Therefore a plea in bar to a bill by a purchaser from the defendant, with actual notice, was overruled. Metcalfe v. Pulvertoft, 2 Ves. & Beam. 200.

"The reason of the rule is, that if a transfer of interest pending a suit, were to be allowed to affect the proceedings, there would be no end to litigation; for as soon as a new party was brought in, he might transfer to another, and render it necessary to bring that other before the Court; so that a suit might be interminable. But this reason has no application to a third person, whose interest subsisted before the suit was commenced, and who might have been made an original party." Per Kent, Ch., Murray v. Lyburn, 2 Johns. Ch. 441.

The doctrine is said to rest, not upon the presumption of notice, but upon public policy. Newman v. Chapman, 2 Rand. 93.

cretion of the Court. A bill of revivor may be filed, at any time within twenty years after decree for an account, unless there has been such a variation of the rights of parties, as may work positive injury and injustice to other persons. Parties claiming under a marriage settlement, subsequent to such decree, are affected with notice, as purchasers *pendente lite*, a decree for an account being only a continuance of the litigation.¹

25. A writ of restitution will not be granted, to put into possession one not a party to the cause, who had been turned out by an injunction, though he had a legal title; he having obtained possession under a grant from the defendant pending the suit.²

26. A devisee obtains a decree to hold and enjoy against the heir, who it was supposed had suppressed the will. Pending this suit, a third person gets an assignment of a mortgage made by the testator, and then purchases the equity of redemption of the heir, with notice of the will. The Court would not admit the purchaser to dispute the decree, nor to try at law, whether the will was not cancelled by the testator.³

27. A purchaser *pendente lite*, on filing a supplemental bill, is liable to all the costs from the beginning to the end of the suit.⁴

28. In a creditor's suit, the debts and costs were paid by the sale of one of two devised estates, and the Court directed the master to settle the proportion which was to be borne by the other. The devisee of the former was entitled for life only; and, he being an ignorant person and a day laborer, no proceedings were had under this direction for twenty-six years, at the end of which time the other estate was sold. The year following the tenant for life died, and his son, the remainder-man, filed a bill, to charge the purchaser of the

¹ Higgins v. Shaw, 2 Dru. & War. 356.

² Gaskell v. Durdin, 2 Ball & Beat. 167.

³ Finch v. Newnham, 2 Vern. 216.

⁴ Anon. 1 Atk. 89.

other estate, with the proportion which it ought to have contributed towards the debts and costs. Held, there was no such *lis pendens* at the time of purchase, as amounted to equitable notice of the charge.¹

29. A joint-stock company, established by Act of Parliament, vesting in them all property then belonging to them, and authorizing them to bring actions in the name of their treasurer for the time being, having purchased an estate, pending a suit against the vendors, to compel the specific performance of an agreement to grant a lease of part; on a bill by the vendee against the treasurer and directors, the plaintiffs were declared entitled to a lease, and the treasurer was enjoined from disturbing their possession, though the rest of the proprietors, being very numerous, were not parties; but no decree could be made for the execution of a lease.²

30. A decree was made against A. B., setting aside, as fraudulent, a purchase by an agent from his principal, and a reconveyance, and the usual accounts of rents and purchase-money, were directed, in which an allowance was to be made for substantial repairs and lasting improvements. A. B. sold and conveyed part of the property, *pendente lite*, and died before the accounts were completed. A supplemental bill was filed against the purchasers, and the heir and personal representatives of A. B.; charging that the purchasers, in case of eviction, claimed compensation out of the estate of A. B., the conveyances, *pendente lite*, being set aside. Held, the purchasers were entitled in this suit, as against their co-defendants, the personal representatives of A. B., to an order for the repayment of their purchase-money; and, as against the plaintiff, to an allowance for substantial repairs and lasting improvements, but to no greater relief. Held, also, that the heir and personal representatives were proper parties.³

31. The rule in question has been held inapplicable, where a party has articted to purchase the estate, taken possession,

¹ *Kinsman v. Kinsman*, 1 Russ. & Myl. 617.

² *Meux v. Maltby*, 2 Swanst. 181.

³ *Trevelyan v. White*, 1 Beav. 588.

and made improvements, before the commencement of a suit against the vendor, although the price be paid and the deed executed pending such suit; this being a mere fulfilment of a prior contract.¹ So one holding a deed at the time of suit commenced may effectually record it afterwards.² (a)

¹ Parks v. Jackson, 11 Wend. 442; ² Irvin v. Smith, 17 Ohio, 226.
acc. Trimble v. Boothby, 14 Ohio, 109.

(a) With regard to the *allegations* required in case of notice to a purchaser; a defendant, pleading a purchase for valuable consideration without notice, must aver, not that he, but that *the vendor*, was seised as owner or pretended owner, and was in possession; which would be satisfied by the possession of his tenant. Daniels v. Davison, 16 Ves. 249; Wallwyn v. Lee, 9 Ves. 24. Where the bill charges particular and special instances of notice of the plaintiff's title on the defendant, his denial of notice generally is not sufficient. Radford v. Wilson, 3 Atk. 315.

CHAPTER XXIV.

REMEDIES OF VENDORS AND PURCHASERS.—LAW AND EQUITY.—
GENERAL JURISDICTION OF COURTS OF EQUITY; COMPENSA-
TION; RESCINDING; LIEN, ETC.

1. HAVING completed our view of the *rights* and *liabilities* of the respective parties to contracts for the sale and purchase of real estate, we proceed to the remaining topic, of the *remedies* by which those rights may be asserted, and those liabilities enforced. It being a universal proposition, that, wherever there is a legal right, there is also a legal remedy; much that falls with strict propriety under the present division has been incidentally stated or alluded to in the preceding chapters. But our plan requires that this whole branch of the general subject should now be fully illustrated.

2. From the whole course of this work, it may have been inferred, that the sale of real property is a prolific subject of questions and cases in *Courts of Equity*; (a) very many of the cases heretofore cited having been settled in those Courts.

(a) A plaintiff, suing at law and in equity at the same time, and for the same matter, will be compelled to elect in which Court he will proceed. The reason and object of this rule is, to relieve a defendant from the "double vexation" of defending himself in two Courts against the same demand, and to avoid the clashing of jurisdiction, which would result from a jury finding a verdict one way, and the chancellor deciding another. *Bradford v. Williams*, 2 Md. Ch. 1.

A Court of Equity, in settling the rights of parties, will not look beyond the circumstances of the transaction in respect to which relief is asked by one party, and take into consideration other and different transactions, set up by the other party, as presenting equities on his side. *Tripp v. Cook*, 26 Wend. 143.

And the statement may be safely hazarded, that no single subject in the law gives more frequent occasion for the exercise of Chancery jurisdiction, in the various forms of *injunction*, *rescission*, *compensation*, and more especially *specific performance*, than executory contracts relating to real property. Thus it is held, that Chancery has unquestionable jurisdiction to decree specific performance of a purchase of real estate, and compel the vendee to pay the purchase-money, although the complainant has a remedy at law.¹ Such subjects are said to be within the settled and common jurisdiction of the Court, and, if the jurisdiction attaches, the Court will go on to do complete justice; although in its progress it may decree on a matter which was cognizable at law.² Thus, where either party has performed a valuable part of his agreement, and is in no default for performance of the residue, he is entitled in equity to a specific execution of the other part of the contract; more especially where it is impossible to place him in *statu quo*.³ And it is, in general, no objection that the vendor's remedy is gone at law, by reason of a mortgage on the estate, &c., so that he could convey a good title at the day fixed upon by the contract.⁴

3. But, on the other hand, equity will not enforce a purchase, where the vendor cannot recover at law, unless he shows a sufficient excuse for his failure, or that his forfeiture at law had been waived by the vendee.⁵ So, when *assumpsit* will not lie on a breach of promise, equity will not decree specifically.⁶ (a)

¹ *Brown v. Haff*, 5 Paige, 235.

² *Catheart v. Robinson*, 5 Pet. 264, 278.

³ *Hays v. Hall*, 4 Port. Eq. 374.

⁴ *Seymour v. Delancey*, 3 Cow. 445.

⁵ *Tevis v. Richardson*, 7 Mon. 656.

⁶ *Hickman v. Grimes*, 1 A. K. Marsh, 87; *Smith v. Carney*, 1 Litt. 295.

(a) The respective powers of, and remedies in, law and equity, in case of *executed conveyances*, with the *covenants of title* usually contained therein, have been thus stated.

Chancery does not interfere, by decreeing specific or further performance, with *executed agreements*. Thus the plaintiffs, supposing they were seized, sold and conveyed lands, with covenants of seizin and warranty, to which

4. The doctrine of *compensation* in Courts of Equity has already been referred to under several titles. (See Chapters

they had no title. Six years afterwards, on being sued by the grantee, the defendant, on the covenant of seizin, they purchased the lands, and tendered a new conveyance, but he refused it. Held, that the Court had no power to compel him to receive the deed, or to interfere with his action on the covenants. *Tucker v. Clarke*, 2 Sandf. Ch. 96.

When a purchaser is evicted by a title covered by his covenants of warranty, this eviction cannot be called a failure of consideration, nor is it available as a defence at law, to an action for the price; because a Court of Law cannot do complete justice between the parties, by placing them in *statu quo*. So, where the sale has been executed by acceptance of a conveyance, fraud is no defence to an action at law for the price. But, when a purchaser with warranty is evicted by a title to which his covenants extend, and the vendor is insolvent, equity will restrain him from recovering the purchase-money, to the extent for which he is liable on his covenants. So fraud committed by the vendor by concealment of an incumbrance created by himself, whereby the purchaser is afterwards evicted, is relievable in equity, by restraining the collection of the purchase-money to the extent of the injury, or by an entire rescission of the contract, although the incumbrance is of record, and the conveyance with warranty against all incumbrances. In all cases of purchase, there is a trust and confidence reposed by the purchaser in the vendor, that the estate is not impaired in value or incumbered by any act done by him; and, by offering to sell, he virtually represents it as not incumbered by himself, or, if it is, that he will free it before the sale is executed. And the cases in which mere concealment of an incumbrance has been held no ground to rescind the contract, it being removed before the hearing, are said to rest upon the principle that no injury has resulted to the purchaser. When an incumbrance has been concealed, the purchaser may require a prompt removal of it. If not effected, he is entitled to a rescission, and may abandon the possession, unless he chooses to retain it as a trust fund, to reimburse himself for money paid. The effect of retaining possession until a decree for rescission, will be only to charge the purchaser with interest on the purchase-money, if the possession is of any value. A covenant covering the eviction will not prevent the purchaser from rescinding for fraud. Nor the circumstance, that the incumbrance could have been removed by the payment of a sum greatly less than that remaining due for the purchase-money. *Cul-lum v. Branch Bank*, 4 Ala. 21.

But it is said to be a well-settled rule of equity, that a grantee, to whom possession has been delivered under covenants of title and warranty, can

13, 16, 17, 18, 19.) In more immediate connection with the present topic of *remedies*, it may again be appropriately introduced.

5. The rule in equity is, that a vendor cannot, with a good conscience, coerce the payment of the whole purchase money, when there was fraud in the sale, in selling what did not belong to the vendor, and leave the vendee to the uncertain damages of an action at law; but the vendee has the right of withholding so much of the purchase-money as will reimburse him for his loss.¹ But Chancery does not entertain jurisdiction of a suit, where the sole object is to obtain compensation in damages for breach of contract, unless the contract is of equitable cognizance merely; if the defendant seasonably object by demurrer or answer.² The jurisdiction of equity for this purpose is held to be merely *incidental* or *ancillary* to a claim for specific performance; even in case of fraud.³ Upon a claim for damages only, a Court of Law is said to be the only proper forum. So it is held, that equity will give damages in lieu of a specific performance, only where it has obtained jurisdiction of the cause on other grounds. Thus, where the defendant has power to fulfil his contract when the bill is filed, but from any cause becomes unable to do so during the pendency of the suit; or where, at the time of making the decree, he can perform it in part only; the Court, having had jurisdiction at first, or having the power to afford partial relief by decreeing a specific performance as far as the defendant's

¹ Ransom v. Shuler, 8 Ired. Eq. 304.

³ Newham v. May, 13 Price, 749.

² Morss v. Elmendorf, 11 Paige, 277.

have no relief against his grantor for a return of purchase-money or security on account of a deficiency or failure of title. And if a grantee in possession has taken no covenants, and the title fails, he will be without a remedy in equity as well as at law, provided the contract were fair and no fraud. But, if fraud is shown in making the purchase or completing it, and whether there be covenants of title or not, the purchaser may come into equity for relief, or to obtain indemnity against eviction, disturbance, or defect of title. Denston v. Morris, 2 Edw. 37.

ability extends, can give the plaintiff compensation by way of damages. It is said, this is as far as the principle ought to be carried.¹ (a) So where it would be difficult to ascertain the amount of injury resulting from breach of contract, equity will not itself ascertain the damages, nor direct an issue *quantum damnificatus*.²

6. Nor can the complainant entitle himself to such compensation, merely by concealing the fact, in his bill, that the defendant is not able to perform his contract specifically, where such fact is known to the complainant at the time of filing the bill.³

7. Where the vendor never had title, or has conveyed it subsequently to the sale, the vendee having notice cannot maintain a bill in equity for mere compensation in damages, but must resort to his remedy at law. But, where the defendant deprives himself of the power to perform his contract specifically, pending a suit to compel such performance, the Court will retain the suit, and award damages.⁴

8. A contract was so drawn, as legally to entitle a vendee to a large quantity of surplus land, not known to the parties; but the vendee had omitted to make his payments, so that he had not a strict legal right to a performance. Upon a bill brought by the vendee for specific performance; held,

¹ Wiswall v. McGown, 2 Barb. 270.

⁴ Morss v. Elmendorf, 11 Paige, 277;

² Pratt v. Law, 9 Cranch, 456, 494.

Woodcock v. Bennett, 1 Cow. 725.

³ Morss v. Elmendorf, 11 Paige, 277;
Bradley v. Bosley, 1 Barb. Eq. 125.

(a) Upon a bill for the specific performance of an agreement contained in a lease, that, at the expiration of the term, the improvements made by the lessee shall remain the property of the lessor, on making a fair compensation therefor, the Court will entertain jurisdiction, though the bill be purely for compensation and damages, provided a specific performance may be decreed, and the complainant can have adequate relief only in equity. The charge for improvements is, in equity, a lien on the property. But the Court will not extend its jurisdiction beyond this claim to a claim for alleged infringements of the rights of the lessee during his term. *Berry v. Vanwinkle*, 1 Green, Ch. 269.

performance should be decreed, only on his making additional compensation, and after deducting so much of the surplus land as had been sold to another.¹

9. A. agreed to sell an estate tithe-free to B. Afterwards, C., the vicar of L., (in which parish part of the estate was situate,) filed a bill for tithes against the occupiers of another part of the estate as also being situate in L. A. agreed that part of the purchase-money should be set apart, as an indemnity to B. against this claim, which was accordingly done, and B. paid the remainder of his purchase-money, and took a conveyance. C. died, and his suit was dismissed for want of prosecution; but the indemnity fund was not transferred to A. One of C.'s successors instituted a fresh suit for the tithes. Pending these proceedings, it was discovered that the lands were situate in the parish of S., and titheable to the rector of S., and, on proof of those facts, the latter suit was dismissed at the hearing. Held, B. was entitled to a compensation out of the fund, for the tithes of the land situate in S.²

10. Where the owner of land, bound by a judgment against a previous owner, covenants to give him a quit-claim deed of an undivided share thereof, at a certain day; and after the day conveys to another; on a bill filed by the covenantee for specific execution, Chancery ought not to decree damages to the value of the land, without providing that the covenantee shall first pay or secure a proportional part of the judgment. In such case, the Court may refer it to a Master to assess the damages.³

11. A purchaser may claim compensation in equity for breach of contract to make a good title, and have an issue to a jury, without first proceeding at law; if the vendor has conveyed away his property in trust, whereby there might be difficulty in obtaining satisfaction of a judgment, and in order to prevent circuity of action; the vendor, or his

¹ *King v. Hamilton*, 4 Per. 311.

³ *Woodcock v. Bennett*, 1 Cow. 711.

² *Crompton v. Melbourne*, 5 Sim. 353.

representative, the trustees, and *cestuis que trusts*, being made defendants.¹

12. Bill in equity for relief. The defendant, A., purchased a farm of the plaintiff, for worthless stock of a company which he represented to be worth \$6,000. Several false representations were made by A., and also by B., concerned in the same company, to induce the plaintiff to take the stock in payment. Decreed, that the sale should be rescinded, the stock and farm each reconveyed, and a Master appointed, to report the amount of rents and waste, after deducting permanent improvements, which should be allowed to the plaintiff. But, if neither the land nor the stock could be reconveyed, the Master to report the damage done by the misrepresentations, and a decree to be entered against the defendants for the amount. And, if the land could be reconveyed, and not the stock, the land to be reconveyed, and the value, if any thing, of the shares, at the time of the sale, deducted from the net income, and a decree made for the balance.²

13. Bill by a vendor for specific performance, with an allowance to the defendant by way of compensation for a part of the estate to which the plaintiff is unable to make a good title. The defendant having taken possession under the agreement, one of the terms of which was that immediate possession should be given; and, in the course of subsequent disputes as to the title to this part of the estate, having been turned out; held, the vendor, in so turning him out, had abandoned his right to a specific performance; and the bill was dismissed, without going into the question of the materiality of the defective part.³ (a)

¹ *Sims v. Lewis*, 5 Munf. 29.

³ *Knatchbull v. Grueber*, 3 Mer. 124;

² *Warner v. Daniels*, 1 Woodb. & 1 Madd. 170.
M. 113, 114.

(a) The following rules apply more particularly to *executed conveyances* than mere executory contracts, but still tend to illustrate the subject treated in the text.

A party defrauded in the purchase or sale of property may rescind the

14. We have already had occasion to consider the subject of the *rescinding* of sales and purchases of real property. (Chapters 13, 17, 18, 19, and *sequ.*) It requires only to be further stated, in the present connection, as may indeed have been inferred from the cases already cited, that Courts of Equity exercise one of their peculiar functions, in wholly or partially rescinding a sale, for fraud, mistake, or other cause,

contract, placing the parties in *statu quo*; or affirm the contract, so far as it has been executed, and claim compensation. But equity will partially rescind the contract, only where no possible injustice will be thereby done. If a party defrauded is entitled to any relief, and it is necessary for him to allege and establish the fraud in order to obtain such relief, he may obtain full relief, without resorting to law; although, as to a part of the relief claimed, he had a perfect remedy at law. And where, by the fraud of the vendee, a part of the price remains unpaid, although the vendor supposed he had been paid in full, there is no waiver of his equitable lien, and he may come into equity in the first instance, to enforce such lien; and, as an incident to this right, equity will ascertain the amount. *Bradley v. Bosley*, 1 Barb. Ch. 125.

The right of a vendee of land, from a part of which he is evicted, to relief from the vendor, by being discharged from payment of part of the purchase-money, does not require a rescission of the contract, but rests on the ground of a partial failure of consideration, of which he may avail himself in equity, if not at law, and against the assignee of the note or bond given, as well as the payee. *Walker v. Johnson*, 13 Ark. 522.

When a vendor sells several tracts of land, with general covenants of warranty, and afterwards the vendee is evicted from one of the tracts, by a person holding a paramount title; he may defeat the recovery of the unpaid purchase-money, as against the vendor, to the extent of the value of this tract. *Ibid.*

Such vendee having, after his eviction, and after the assignment of his obligation for the purchase-money, received back from the land-office the entrance-money paid by his vendor for the land, by way of indemnifying himself to that extent against the insolvency of the vendor; held, he did not thereby waive his defence, as against the assignee, of such partial failure of consideration. *Ibid.*

Equity will, in cases of a very peculiar and extraordinary character only, compel a purchaser to receive a title, in lieu of damages which he may have recovered against the vendor, for failing to convey. *Royster v. Shackelford*, 5 Litt. 229.



which would render its enforcement and execution inequitable. Thus, a purchaser had stipulated for a good title, on payment of the purchase-money, but the title was in the heirs of a third person, who were non-residents. The parties to a bond, indemnifying the purchaser against a mortgage upon the land, were also non-residents, and one was insolvent, and the other did not prove his ability to respond in damages. Held, Chancery would afford relief.¹ So the false representation of the vendor, as to the existence of a material fact, constituting an inducement to the contract, and upon which the vendee did, and had a right to rely, in concluding the purchase; entitles the latter to rescind the contract in a Court of Equity, although the vendor may not have known that such representation was false.² (*Supra*, p. 325.) But whether without first abandoning possession, *quære*?³ So, where a vendee, who has paid the purchase-money, and, by the terms of the bond, has a present right to the title, files his bill to rescind the contract, and for an account of the purchase money paid, &c.; the general charge, that the defendant has no title to the land, that it is incumbered with the dower of the wife of a previous owner, and that it will be impossible for the defendant to procure a title for many years to come, makes out at least a *prima facie* case of equitable cognizance, and is sufficient to require the defendant to answer.⁴

15. But equity will not rescind a contract, where the vendor, although unable to make title, is perfectly solvent, and has been guilty of no fraud, on the ground that he is a resident of another State; if he was such at the time of the contract, and has so continued ever since.⁵ So, where a vendee retains possession, equity will not rescind the contract, unless upon some special ground; such as the vendor's inability to make title, coupled with insolvency, or fraud in the sale.⁶ So, although equity may rescind a conveyance or a contract therefor, which has been procured by fraud, when a proper

¹ *Griggs v. Woodruff*, 14 Ala. 9.

² *Read v. Walker*, 18 Ala. 323.
Ibid.

⁴ *Read v. Walker*, 18 Ala. 323.

⁵ *Parks v. Brooks*, 16 Ala. 529.

⁶ *Ibid.*

case for it is presented ; no such relief can be given, where no conveyance, or written or other legal contract or bargain for the conveyance, of any part of the land, by the defendant to the plaintiff, is proved to have existed at any time.¹ (a) So a purchaser who discovers that a fraud has been prac-

⁴ Woodman v. Freeman, 25 Maine, 531.

(a) In a suit to set aside a conveyance after twenty-seven years, on the ground of fraud, consisting in the lunacy of the vendor, insufficient consideration, suppression, and coercion on the part of the purchaser, the plaintiff failed in proving any of the alleged grounds of fraud, but proved lunacy. Held, the Court would not set aside the conveyance. Price v. Berrington, 7 Eng. L. & Eq. 254.

A., supposing that he had title to a tract of land of which B. had possession, agreed to sell it to him, and executed a conveyance, with full covenants. It afterwards appeared, that A. had no title to the tract, and that his deed conveyed another tract, to which A. had title. Upon discovering the mistake, B. offered to return the deed, and to rescind the contract, which A. refused. Thereupon, B. sued at law, to recover the purchase-money. Held, he could not recover, and that equity alone could afford relief. Homer v. Purser, 20 Ala. 573.

A bill for the rescission of a sale alleged, that the vendor sold and conveyed to two of the complainants, while the deed, which was made an exhibit to the bill, conveyed to one of the complainants only. Held, no material variance, as the defendant could not have been taken by surprise. Lanier v. Hill, 25 Ala. 554.

A sale is sometimes rescinded by *cancelling* the security by which it is effected. But it is held that equity will not decree cancellation of a bond for conveyance for breach of the conditions, when the parties have an adequate remedy at law. Shoup v. Cook, 1 Cart. 135.

A. contracted to sell to C., without authority from B., the owner. Afterwards, B. made a quitclaim deed to C., and gave it to A. as an escrow, with authority to deliver the deed to C., upon performance of certain conditions. After this, A. confederated with C., to defraud B. out of his interest ; and gave the deed to C. without the conditions being fulfilled. Held, equity would decree the cancellation of the deed, and also that C. restore possession, accounting for the rents and profits ; but that C., who had purchased an adverse title, was not bound to surrender it. Also, that C. could not then claim under the deed from B., by complying with the original contract with A. ; and that it was too late to ask specific performance of the contract, after having evaded and repudiated it. Clement v. Evans, 15 Ill. 92.

tised upon him, or that the other party has, by his conduct, prevented him from enjoying the fruits of his purchase, must, to entitle himself to relief in a Court of Equity, immediately give notice to the vendor that he will no longer be bound by his contract, but will rescind it.¹ So, where a vendee, discovering a defect in his vendor's title to part of the land, sues at law on the contract, and recovers judgment for, and collects, the damages sustained, by reason of the defect; he thereby elects to treat the contract as valid, and cannot afterwards sustain a bill in equity to have it rescinded.² So, where a vendee seeks to rescind, for want of title in the vendor, he must restore to the vendor all he received, and place him back in his original situation.³ So the Court will not set aside a purchase of a house and lot, on the allegation of an imperfect or incumbered title, not clearly shown to be so, after a long possession by the purchaser, and a confession of judgment for the purchase-money. Such conduct amounts to a waiver, though the Court might give some relief ultimately, if the title turned out to be really bad. The vendor having enforced the judgment for his purchase-money, and bought in the property at a very low rate, but offering to rescind the sale on payment of the debt; the Court decreed accordingly.⁴

16. Where a vendee seeks by his bill a rescission of the contract, and an account for purchase-money paid and improvements; an averment, that, in the event of a rescission, he will lose a considerable portion of the purchase-money, and of the amount due for improvements, if he is compelled to abandon all recourse upon the vendor's interest in the land, and to trust to his personal responsibility and solvency, shows a sufficient excuse for the retention of possession.⁵

17. It has been seen, (Chap. 1,) to what extent a purchaser of lands becomes the *owner* of, or gains a *title* to them, before any actual conveyance. It remains to be stated,

¹ Alexander v. Utley, 7 Ired. Eq. 242.

⁴ Roach v. Rutherford, 4 Desaus. 126.

² Pettus v. Smith, 4 Rich. Eq. 197.

⁵ Read v. Walker, 18 Ala. 323.

³ Brown v. Witter, 10 Ohio, 142.

in the present connection, as a right or claim recognized only by Courts of Equity, that such purchaser, by payment of the purchase-money, has been sometimes held to acquire a *lien* upon the estate, corresponding with the lien of a vendor for the price, after an actual conveyance. Under such circumstances, the purchase-money is said to have been paid *punctually, prematurely, or by surprise*. The lien in question has been distinctly asserted in some English cases, but in others doubted or denied, and can hardly be regarded as a settled rule of American law. (a) The high authority of Sir Thomas Clarke, M. R., and of Judge Story, may be cited in its favor, and that of Mr. Sugden against it.¹

18. The most frequent and important exercise of Chancery jurisdiction, in reference to the sale and purchase of real property, namely, that of *specific performance*, will be considered in the next chapter.

¹ Burgess v. Wheate, 1 W. Bl. 150; You. & Jer. 264; Ludlow v. Grayall, 2 Story, Eq. s. 1217, n.; Sugd. V. & P. 11 Price, 58; Small v. Attwood, 1 258; Payne v. Atterbury, Harring. Ch. Younge, 507; Cator v. Pembroke, 1 414; Coote, 265; Lowell v. Mutual, Bro. 301; Regan v. Walker, 2 Chandl. &c. 8 Cush. 132; Ætna, &c. v. Tyler, 133. 16 Wend. 385; Oxenham v. Esdaile, 3

(a) It has been held in Indiana, that a vendee of real estate has a lien thereon for the money paid, if the vendor refuse to convey, even as against a subsequent purchaser with notice. Shirley v. Shirley, 7 Blackf. 452. So in Kentucky and Alabama, a vendee, whose contract is dissolved, has a lien on the land for his purchase-money and interest, and the value of the improvements; nor should he be compelled to surrender, until they are paid or secured. Griffith v. Depew, 3 Marsh. 179; Conner v. Banks, 18 Ala. 42.

CHAPTER XXV.

SPECIFIC PERFORMANCE.

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| 1. Nature and history of the remedy. | 20. And <i>reasonable</i> and <i>equitable</i> — |
| 3. Its peculiar application to contracts relating to real estate. | fraud, mistake, &c. |
| 4. Questions of jurisdiction, <i>in rem</i> and <i>in personam</i> . | 27. But not necessarily <i>beneficial</i> . |
| 5. Form of the contract; bond with penalty. | 28. Public policy. |
| 7. Specific performance, in connection with other modes of relief. | 30. Consideration, inadequate or excessive. |
| 12. Denial of specific performance, and rescinding of the sale, compared. | 34. Price fixed by arbitration. |
| 13. <i>Compensation</i> —damages. | 39. Plaintiff must prove performance of his own contract. |
| 14. Contract must be <i>certain</i> . | 44. Partial failure of title. |
| 16. And <i>mutual</i> . | 45. Statute of Frauds—part-performance. Defences; pleading; evidence, &c. |

1. As has been already remarked, the most common exercise of equity jurisdiction, in reference to the sale and purchase of real property, is in the form of *specific performance*; whereby one party, instead of recovering damages from the other for a breach of contract to sell or buy, and more especially the former, enforces the actual execution of such contract, by the penalties with which a Court of Chancery is armed for effecting its decrees. This peculiar jurisdiction is said to be of very ancient date, if not coeval with the existence of Courts of Equity.¹ It is also said, that, before the time of Lord Somers, the practice used to be, on bills for a specific performance, to send the party to law; and, if he recovered damages, the Court of Chancery entertained the suit; otherwise the bill was dismissed. But no such practice now exists, if indeed it ever really prevailed.²

2. It is said, on the one hand, that specific performance will sometimes be decreed where no action for damages would lie, as where, through mere negligence, and without

¹ 2 Story, Eq. s. 716.

² Ibid. s. 738.

unfairness, the plaintiff has failed to comply with his own part of the contract;¹ and on the other, that it will in some cases not be decreed, though an action might perhaps lie for damages, as where the vendor's title is involved in difficulties which cannot be removed.² So it is said, the right of a vendor to come into a Court of Equity to enforce a specific performance is unquestionable. Such subjects are within the settled and common jurisdiction of the Court. It is equally well settled, that, if the jurisdiction attaches, the Court will go on to do complete justice; although in its progress it may decree on a matter which was cognizable at law.³

3. The peculiar jurisdiction of Courts of Equity, with reference to specific performance, over contracts relating to *real property*, arises from the fact, that, in case of personal property, no particular value is generally attached to one article over others of the same kind, and therefore full compensation may be obtained by damages, with the amount of which another similar article may at once be purchased; while the value of real property in the eyes of the purchaser may depend upon circumstances of position, neighborhood, soil, and in general upon considerations of taste or fancy, for which damages are no compensation.⁴ It is said, "No subject is more proper for the power of a Court of Chancery in decreeing specific execution, than a contract for the sale of real estate; for what is agreed to be done ought in conscience to be done. Nor is the remedy at law for damages complete or adequate; for the thing contracted for is wanted, and the value in money may often be an unsatisfactory compensation."⁵ Upon these considerations, the general doctrine is laid down, that, where a contract respecting real property is in its nature and circumstances unobjectionable, it is as much a matter of course for Courts of Equity to decree a

¹ Lennon v. Napper, 2 Sch. & Lef. 684.

² 2 Story, Eq. ss. 748-9.

³ Cathcart v. Robinson, 5 Pet. 264.

⁴ See Adderley v. Dixon, 1 Sim. & St. 607.

⁵ Ensign v. Kellogg, 4 Pick. 1.

specific performance of it, as it is for a Court of Law to give damages for the breach of it.¹

4. With reference to the jurisdiction of the Court, as determined by the location of the property on the one hand, or the residence of the defendant on the other, it is well settled in Great Britain, that a bill for specific performance may be maintained, though the land is situated in a foreign country, if the parties reside within the territorial jurisdiction of the Court. "*Æquitas agit in personam*." Thus specific performance was decreed of a contract, entered into by the proprietors, respecting the boundaries of the colonies of Pennsylvania and Maryland. So of an agreement respecting the Isle of Man, and lands in Ireland.² So, it seems, a contract made in South Carolina, for land lying in another State, may be enforced *in personam*, by one party against the other.³ And, on the other hand, it has been held, that specific performance of a contract to convey land in Massachusetts may be decreed against an inhabitant of Connecticut, who has been served with personal notice in Massachusetts.⁴

5. The precise form, in which a contract for the sale of real property is expressed, is immaterial with reference to the right of specific performance. Thus, though the contract appears only in the condition of a bond with penalty, it will be enforced as an agreement, and the party cannot escape from specific performance by paying the penalty.⁵

6. More especially will this rule be adopted, where the bond is accompanied by another, absolute agreement. Thus the defendant agreed in writing to convey land to the plaintiff on certain terms, and at the same time, by another writing, to forfeit a certain sum if he should fail so to convey. Held, the plaintiff was entitled to specific performance of the former agreement, upon complying with his own

¹ 2 Story, Eq. s. 751.

² Penn. v. Baltimore, 1 Ves. 444; 582.
Athol v. Derby, 1 Ch. Cas. 221; Archer
v. Preston, 1 Vern. 77.

³ Ramsay v. Brailsford, 2 Desaus.

⁴ Dooley v. Watson, 1 Gray, 414.

⁵ Logan v. Wienholt, 7 Bligh. 1;
Ensign v. Kellogg, 4 Pick. 1.

contract. Shaw, C. J., says: "The promise of the defendant to pay the plaintiff one hundred dollars, if the defendant should fail to perform his agreement to convey the land, was merely a security for the performance of that agreement. Courts of Equity have long since overruled the doctrine that a bond for the payment of money, conditioned to be void on the conveyance of land, is to be treated as a mere agreement to pay money. When the penalty appears to be intended merely as a security for the performance of the agreement, the principal object of the parties will be carried out. The agreement between the parties in this case is clearly an alternative agreement. It was an absolute agreement to convey real estate, and may be treated in all respects as such, either in a Court of Law or Equity, without regard to the note."¹

7. The question of specific performance often arises in connection with other grounds for equitable interference. This relief is sometimes granted, instead of other equitable relief which is directly sought; and, on the other hand, a prayer for other relief sometimes results in a decree for specific performance, with such terms and limitations as the circumstances of the case may require.

8. A bill in equity, praying specific performance of an agreement to convey land, also alleged that the defendant purchased the land as his agent and with his money, and therefore held it in trust for him. Held, the bill was not inconsistent in its allegations, and might be supported as a bill for specific performance; it being a rule of equity pleading, that a bill may be framed in alternative form, and facts of a different nature alleged to support it, if in either alternative the title to relief will be the same.²

9. The plaintiff, being defendant in an execution, permitted the defendant, the plaintiff in the execution, to buy certain lands of his at sheriff's sale, upon which the defendant agreed by parol, that the plaintiff might sell the lands, and

¹ *Dooley v. Watson*, 1 Gray, 414, 416.

² *Gerrish v. Towne*, 3 Gray, 82.

reap any profit on the sale, after paying the defendant the sum of \$375, due him by the plaintiff; upon which the plaintiff sold the land by parol to A. for \$650, of which A. was to pay the defendant \$375, and the residue to the plaintiff. In pursuance of this agreement, A. paid the defendant the \$375, but failed to pay the plaintiff the residue, and delivered him up the land in consequence thereof; upon which the plaintiff filed his bill against the defendant for a specific performance of his agreement to make title to the land, or else pay the money received from A. to him. Held, he was not entitled to specific performance, because the contract was parol; nor to recover back the money, which could be recovered only by A., if by any one, the contract being held invalid.¹

10. A. sold land to B. for \$2,000, to be paid shortly, in order to release the land from certain mortgages. B. paid a part of the purchase-money, and then brought a bill in equity, alleging that his vendor was insolvent, was trying to sell the land to other persons, and was committing waste. He obtained a decree, enjoining A. from selling and from committing waste, and afterwards, having tendered good notes to the full amount of the purchase-money, and offering to perform his part of the contract, he brought an amended bill to compel a specific performance. It appeared that the mortgagees, to whom B. had tendered good notes to the amount of their lien, had refused to accept them, and that the land was sold under a decree of foreclosure, and bought in by B., who paid cash for it, to this amount. Held, that B. had a right to extinguish the lien in that way, and was entitled to a decree for specific performance.²

11. Land was sold, to be paid for in instalments, a deed to be given on payment of the last instalment. The vendees entered and enjoyed possession, the last instalment was paid to the administrator of the vendor, and the vendees brought an action at law to recover back the pur-

¹ *Beaman v. Buck*, 9 Sm. & M. 210.

² *Berry v. Walker*, 9 B. Mon. 464.

chase money, for a breach of the covenant to convey. Held, on a bill in equity by the heirs of the vendor, to enjoin the judgment at law, and to compel specific performance, that, as there was no default in the vendor during his life, and the heirs were infants at the time of the judgment, and unable to convey, and as the vendees had not been injured by the want of a conveyance, having been in possession of the land sold; the judgment at law should be enjoined, and the heirs, on completing their title, should convey the land to the vendees.¹

12. Where one party seeks specific performance of a contract, the other may resist it upon the same grounds, on which, as has been seen, (Chap. 24,) equity often interferes, affirmatively, to cancel or rescind such contract. But the general rule upon this subject is, that Chancery requires stronger reasons for setting aside an agreement, or disturbing it after execution, or delivering it up to be cancelled, than for denying specific performance.² (See p. 436.) So equity will exercise its discretion, by dismissing bills for specific performance, with costs, although under the same circumstances it would not cancel the agreement on a bill filed for that purpose.³

13. We have already (Chap. 24) had occasion to consider the subject of *compensation*, as administered in Courts of Equity, a remedy commonly applied to cases of *part performance*, or a partial failure in title or value of the property in question. It may be added, in the present connection, that, although a vendor cannot insist upon the vendee's accepting a part-performance of the contract, yet the vendee may insist upon a specific execution in part, and damages for the residue, where the vendor is unable to perform *in toto*. (See p. 246.) And the Chancellor will direct an issue of *quantum damnificatus*.⁴ So a complainant may resort to a Court of Chancery for a specific conveyance of land, or, if

¹ Nesbit v. Moore, 9 B. Mon. 508.

² Seymour v. Delancey, 3 Cow. 445.

³ Davis v. Symonds, 1 Cox, 402;

Mortlock v. Buller, 10 Ves. 292; Blackwilder v. Loveless. 21 Ala. 371.

⁴ Jones v. Shackelford, 2 Bibb, 411.

the vendor cannot convey, then for damages; and, if the specific execution cannot be decreed, the Court will decree the damages.¹ (a)

14. To entitle a party to specific performance of an agreement for the sale of real estate, the contract must be *certain* in its terms.² Thus, where a covenant is made to renew a lease, in which the rent is not fixed, specific performance will not be decreed.³ So execution of an agreement for an estate at £3,600 was refused, on account of a rent left unsettled, and a doubt whether it was five shillings or one.⁴ So, upon the ambiguous terms of a contract, as including or excluding the timber, the purchaser's bill for specific performance was dismissed; and, he having throughout insisted upon his construction, the Court would not compel the vendor to convey, upon the terms originally offered.⁵ So equity will not entertain a bill for specific performance, in which the material terms of the contract are not distinctly set forth. Hence a bill brought by a widow, against her husband's devisees and representatives, for specific performance of an antenuptial agreement, to settle on her "a plantation and permanent home for life," must distinctly set forth what land, where situate, the number of acres, &c.⁶

15. More especially, equity will not decree specific execution of an uncertain contract, against a party not lawfully competent to execute it. Thus A., tenant for life, with power to make leases for twenty-one years at the best improved rent, made a lease to B., and thereby covenanted "for the term of his life to renew said lease to B., his executors, administrators, and assigns, by giving them a lease for twenty-one years when applied to." B. surrendered the lease, under a clause empowering him so to do; and after-

¹ Fisher v. Kay, 2 Bibb, 434.

² German v. Machin, 6 Paige, 288.

³ Robinson v. Kettletas, 4 Edw. Ch. 524.

67.

⁴ Middleton v. Wilson, Loft, 801.

⁵ Clowes v. Higginson, 1 Ves. & Bea.

⁶ Mallory v. Mallory, 1 Busb. Eq. 80.

(a) In such case it is proper (where the vendor is dead) to make the heir and executor parties.

wards, upon a new agreement, A. indorsed on the old lease, "I promise and agree to perfect a fresh lease to B. at any time he shall demand the same, at £5 a year less than the within-mentioned rent." It being uncertain whether the agreement was for more than one term of twenty-one years, and an agreement for a further lease (even if clear) being in fraud of the power, a bill for renewal of the lease for a second term of twenty-one years was dismissed.¹ (a)

16. Specific performance will not be decreed, unless the contract is *mutual*;² or where one party only is bound by the agreement;³ or where there is not a *quid pro quo*.⁴ (See p. 439.) Upon this ground it has been held, that an *infant* cannot sustain a suit for specific performance.⁵

17. More especially equity will not enforce a mere voluntary agreement, not valid at law, against a legal claim for a just debt, and where there is no accident or fraud.⁶

18. But, although the rule above stated may be considered as well established, the rights of parties to agreements to enforce specific performance are not coextensive; for their respective rights depend upon their conduct, and the conduct of one may give him the right to apply to the Court, while the conduct of the other may debar him from that right.⁷

19. The objection of want of mutuality may be waived. Thus a bill was filed by a railway company, for specific per-

¹ Harnett v. Yeilding, 2 Scho. & Lef. 549.

² Bodine v. Glading, 21 Penn. 50; German v. Machin, 6 Paige, 288.

³ Benedict v. Lynch, 1 Johns. Ch. 373; Boucher v. Vanbuskirk, 2 A. K. Marsh. 346.

⁴ Shackelford v. Handley, 1 A. K. Marsh. 370.

⁵ Flight v. Bolland, 4 Russ. 298.

⁶ Minturn v. Seymour, 4 Johns. Ch. 500; Woodcock v. Bennett, 1 Cow. 733.

⁷ Southeastern, &c. v. Knott, 17 Eng. L. & Eq. 555.

(a) Uncertainty as to the rule of law applicable to the case has also been held a sufficient objection to a decree of specific performance. Thus, upon a late decision of the Court of Exchequer, that a presumption from non-payment of tithes cannot bar even a lay impropiator, the Lord Chancellor, though holding the contrary opinion, would not compel a purchaser to take a title depending on this question; and dismissed the bill against him for a specific performance. *Rose v. Calland*, 5 Ves. 186.

formance of a contract for the purchase of land, entered into by their agent. The defendant objected, that it did not appear that the agent was authorized under the corporate seal, and therefore there was no mutuality. The objection was overruled, on the ground that the company had, before the bill was filed, acted on the contract, by entering into possession of the land and making a railroad over it.¹

20. Specific performance being not a matter of right, but of discretion,² equity will not decree a specific execution of articles, where they appear to be *unreasonable* or *founded on a fraud*.³ Nor in a *hard case*; more especially where the plaintiff had not complied with the terms.⁴ Thus, under circumstances that would have amounted to a breach of trust, inadequacy of consideration, arising from gross negligence of the agent, and a want of due authority; the bill was dismissed, though the plaintiff was unimpeached; without prejudice to his remedy at law.⁵ So it is held, that the difference between that degree of unfairness, which will induce a Court of Equity to interfere actively, by setting aside a contract, and that which will induce a Court to withhold its aid, is well settled; (see p. 433,) that the plaintiff must come into Court *with clean hands*, and that a defendant may resist a bill for specific performance, by showing that under the circumstances the plaintiff is not entitled to the relief he asks. As in case of omission or mistake in the agreement; or where it is unconscientious or unreasonable; or where there has been concealment, misrepresentation, or any unfairness; and more especially if to any unfairness a great inequality between the price and value be added.⁶ So it is held, that, in decreeing specific performance, the Court is bound to see that it really does that complete justice which it aims at, and which is the ground of its jurisdiction. Hence, if the

¹ London. &c. v. Winter, 1 Cra. & Phil 57.

² Blackwilder v. Loveless, 21 Ala. 371.

³ Young v. Clerk. Finch's Prec. 538; Seymour v. Delancey, 6 Johns. Ch 225;

Clarke v. Rochester, &c. 18 Barb. 350; Torrey v. Buck, 1 Green. Ch. 367.

⁴ Rugge v. Ellis, 1 Desaus. 161.

⁵ Mortlock v. Buller, 10 Ves. 292.

⁶ Best v. Stow, 2 Sandf. Ch. 298.

claim for a deed is not just and reasonable; if the party has been grossly negligent of his rights, or has abandoned his contract; equity will not afford him relief.¹ So, where the contract appears hard or unreasonable in itself; or where, from a material change of circumstances since the contract, the performance would be attended with peculiar hardship to the defendant; the complainant will be left to his remedy at law.²

21. *Misrepresentation*, though in a slight degree, is an objection to specific performance; though it might not be sufficient to rescind the contract.³ So a mere *concealment* on the part of the vendor.⁴ (See Chap. 19.) So there shall be no specific performance, in case of any *surprise*, making it not fair and honest to call for it; but the plaintiff will be left to law.⁵ So in case of accident or mistake; as where a lot is sold, and supposed by both parties to be of certain dimensions, and found afterwards to be more than as large again.⁶ (See Chap. 18.)

22. So a misrepresentation made by the vendor in a matter of substance, affecting the value of the estate sold, is a good defence to a suit for specific performance, although the vendor, as well as the vendee, was ignorant of its untruth. (See p. 325.) As in case of an erroneous statement, that land in a distant State was situated in a particular county, in which the purchaser desired to buy.⁷

23. A. articles to sell lands to B. for £15,000, the whole to be paid in money, or in so much land returned, as would make up what he paid short of the £15,000. A. conveys part of the lands to B., and by his persuasion undervalues that part. Then B. sells this part to C., and would then have returned so much of the rest as would make up the £15,000. Articles set aside as unreasonable; and the sale by B. to stand.⁸

¹ King v. Morford, 1 Saxt. Ch. 274.

² Perkins v. Wright, 3 Har. & M'Hen. 326; Clitherall v. Ogilvie, 1 Desaus. 250; Edwards v. Handley, Hard. 602.

³ Cadman v. Horner, 18 Ves. 10.

⁴ Shirley v. Stratton, 1 Bro. 440.

⁵ Mortlock v. Buller, 10 Ves. 292.

⁶ Schmidt v. Livingston, 3 Edw. 213; Mason v. Armitage, 13 Ves. 25.

⁷ Best v. Stow, 2 Sandf. Ch. 298.

⁸ Whorwood v. Simpson, 2 Vern. 186.

24. A. articles with B. for the purchase of an estate of £180 per annum, for which he is to give thirty-five years' purchase, upon a grant and conveyance to him, and pays £50 in part; but, discovering that £30 per annum of the lands were copyhold, refuses to go on. On a bill by B., equity will not decree specific execution, the agreement being inequitable; but will order the £50 to be paid back.¹

25. The fraud relied upon as a defence may be a fraud *against third persons*. Thus, upon an execution against the plaintiff and one A., the plaintiff's dwelling-house was levied on and advertised for sale. By request of the plaintiff, the defendant bid off the premises, and took a deed from the sheriff, with the mutual purpose of protecting the property from the creditors of the plaintiff. Held, the plaintiff could not maintain a bill, to enforce a conveyance from the defendant.²

26. So, where the agreement appears to have been made to defeat or defraud a creditor of the plaintiff, or an intervening purchaser at a sheriff's sale, under a judgment and execution against him; specific performance will not be decreed.³

27. Specific performance, however, will not be refused, merely because the contract is a losing one for the plaintiff.⁴ Thus the defendant treats with the plaintiff for a piece of land, having an intention to build a mill, to which the consent of the corporation is necessary; but the plaintiff refuses to treat on condition, and the defendant fails in obtaining consent. This failure in his speculation is no defence against a bill for specific performance.⁵ So, in an agreement for the purchase of an estate, one of the stipulations was, that the vendor should be tenant from year to year to the purchaser. Held, the inability of the vendor to perform this stipulation, by reason of embarrassments, of which the purchaser must

¹ Hick v. Phillips, Prec. Cha. 575.

² Baldwin v. Campfield, 4 Halst. Ch. 111.
600.

³ St. John v. Benedict, 6 Johns. Ch.

⁴ London v. Richmond, 2 Vern. 421.

⁵ Adams v. Weare, 1 Bro. 567.

have had some notice, was no bar to the specific performance.¹

28. Specific performance will undoubtedly be refused, of a contract *against public policy*. But this ground, in order to be effectual, must be clearly established. Thus the defendant, having a preëmptive right to certain public land, but being unable to obtain a title from the land commissioners, as the land might be needed for public purposes, entered into an agreement with A., that A. should procure a title for him, at his own expense, and pay half the purchase-money, for which the defendant, when he should receive his deed, would convey to him half the lot. A. fulfilled his contract, and a deed was made to the defendant. Afterwards, A. assigned the contract to the plaintiff, by a trust deed for benefit of creditors. The plaintiff brings a bill for specific performance. Held, the contract was not against public policy, but should be enforced.²

29. An aged person bound himself to dispose of his estate by will in a certain way, in consideration of certain provisions for his support for life. Held, this agreement was not contrary to any rule of policy; and, in case he should fail to make a will, equity would decree a conveyance, and a jury would give damages to the amount of the value of the property.³

30. A contract of sale will not be enforced by specific performance, unless founded on *an adequate consideration*.⁴ (a) (See p. 20, p. 435.) But mere difference in value, though

¹ Lord v. Stephens, 1 Y. & Coll. 222.

³ Logan v. McGinnis, 12 Penn. 27.

² Sedgwick v. Stanton, 18 Barb. 473.

⁴ Mead v. Randolph, 8 Tex. 191.

(a) It is said, the Court cannot speculate on the damages which a jury might have given for breach of an agreement, nor on the damage caused to property by failure of a sale; therefore the specific performance of an agreement of hereditaments, where the consideration-money is £50, is not too small a matter for the jurisdiction of the Court. Bennett v. Smith, 10 Eng. L. & Eq. 272.

So the *nature* of the principal consideration is immaterial, if the contract relate to land. Thus specific performance will be decreed, though the land

considerable, is not, of itself, a sufficient ground for refusing a specific performance.¹ So it has been held, that inadequacy of price, in order to have this effect, must amount in itself to conclusive and decisive evidence of fraud.²

31. But, on the other hand, it has been decided, and this is the prevailing doctrine, that, though mere inadequacy of price is not, of itself, sufficient to set aside a sale of land, yet it is sufficient to induce the Court to refuse to decree a specific performance, and to leave the party to his remedy at law; especially where the inadequacy of price is so great, (being half the value,) as to give to the contract the character of unreasonableness, inequality, and hardship.³

32. More especially will this principle be applied, where the contract is not in its terms certain and explicit. Thus A. and B., owning adjoining lands, entered into an agreement in writing, by which they mutually stipulated, each to lay out a road of a certain width through his own land, and B. agreed to convey to A. twenty feet of land, describing it. On a bill in Chancery, brought by A. against B., for specific performance of B.'s agreement to convey the land; held, it did not appear, that the laying out of the road was, in any

¹ *Emery v. Wase*, 8 Ves. 505.

³ *Seymour v. Delancey*, 6 Johns. Ch.

² *Coles v. Trecothick*, 9 Ves. 234; 222; 3 Cow. 445.

Harrison v. Town, 17 Mis. 237.

contracted for is chiefly valuable on account of its *timber*. Equity adopts this principle, not because the land is fertile, or rich in minerals, but because it is land. *Kitchen v. Herring*, 7 Ired. Eq. 190.

A. made a parol contract for the purchase of land from B., for which he paid by delivering a horse, and also a bond of C., which he caused to be made payable to B. C. died insolvent, the bond not having been collected. Held, on a bill for specific performance or compensation, to which B. pleaded the Statute of Frauds, that A. was entitled to compensation; that, so far as related to the horse, if that had been the only subject of controversy, A. would have had no claim to relief, as he could have had complete redress at law, upon the rescission of the contract; but, as he had no legal redress as to the bond, that equity would entertain jurisdiction of that matter; and, thus taking jurisdiction of part of the case, would take jurisdiction of the whole, and grant the relief prayed for. *Chambers v. Massey*, 7 Ired. Eq. 286.

way, the inducement to such agreement of B., or that it was such a special benefit to B., or injury to A., as to constitute a legal consideration; and that a Court of Equity will not compel specific performance of an agreement, though fairly made, and upon such a legal consideration as would be sufficient to support it in an action at common law, if the agreement be not explicit, or the consideration inadequate.¹

33. On the other hand it has been held, that specific performance of an *extravagant* purchase might be decreed;² and that excess of price over value, if the contract be free from imposition, is not of itself sufficient to prevent such decree. But still it is an ingredient which, associated with others, will contribute to prevent the interference of a Court of Equity.³ So it has been doubted, whether it be consistent with the rules of Equity, to decree performance of so extravagant and unreasonable a bargain, as a sale of land at forty years' purchase.⁴ And it has been held, that, where an agreement is entered into for the purchase of an estate, at a price far beyond its value, though without any circumstances of fraud or surprise; the Court will not decree specific performance, but on the other hand will not rescind.⁵

34. Equity will enforce *an award of arbitrators* upon a contract of sale and purchase. Thus the vendor and purchaser of a copyhold estate covenant, for themselves and their representatives, to fulfil the contract, and to refer the question of value, under a penalty. One of the parties dying, his representatives cannot annul the decision of the referee, by showing an error in his estimate, or compel the acceptance of the penalty, in satisfaction of their breach of contract.⁶

35. But it is held, that, according to the Roman and the English law, as administered both in Courts of Law and Equity, *a fixed price* is an essential ingredient in a contract

¹ *Dodd v. Seymour*, 21 Conn. 476.

² *Keen v. Stuckely*, Gilb. Eq. 155.

³ *Best v. Stow*, 2 Sandf. Ch. 298.

⁴ *Lewis v. Lechmere*, 10 Mod. 503.

⁵ *Day v. Newman*, 2 Cox, 77.

⁶ *Belchier v. Reynolds*, 2 Keny. 2d part, 91.

of sale. A contract, therefore, that does not settle the price, is valid and complete, only when and if the party to whom it is referred shall fix it; and is otherwise totally inoperative.¹

36. A decree was made for specific performance of an agreement to grant a lease, rejecting one of the terms, viz: for such conditions, &c., as shall be judged proper by (a third person named;) and substituting a reference to the Master; the agency of such person not being of the essence of the contract.² So execution of a contract was refused; the valuation of an arbitrator, who settled the price, not being properly and discreetly made.³ So, though referees may take the opinion of a third person as evidence, they cannot previously agree to be bound by it.⁴ So, though a person may agree to sell at a price to be fixed by arbitration, and the award can be impeached only upon the grounds affecting all awards, as fraud or gross mistake, yet, upon such an agreement, where some of the persons to be bound were married women, of whom also one had not executed, the Court refused a specific performance, and dismissed the bill; leaving the plaintiff to law. Upon an appeal, the decree was affirmed, on the ground that the evidence did not prove satisfactorily, as it ought, especially in the case of married women, that the valuation was made with due attention and care.⁵

37. Two surveyors, who, it had been agreed, should fix the price of an estate, stated in their valuation the sum to be paid and the quantity of land, and that, if it proved to be less, either £84 or £42 should be deducted, according to the parts of the estate in which the deficiency occurred, but did not state the quantity contained in each part. Held, the valuation was uncertain, and a specific performance could not be enforced.⁶

¹ *Milnes v. Grey*, 14 Ves. 400; *Gourlay v. Somerset*, 19 Ves. 429.

² *Gourlay v. Somerset*, 19 Ves. 429.

³ *Ibid.*

⁴ *Hopcraft v. Hickman*, 2 Sim. &

Stu. 130. See *Emery v. Wase*, 5 Ves. 846.

⁵ *Emery v. Wase*, 5 Ves. 846.

⁶ *Hopcraft v. Hickman*, 2 Sim. & Stu.

130.

38. Agreement for sale, according to the valuation of two persons, one chosen by each party, or of an umpire, to be appointed by those two in case of disagreement. Bill for a specific performance, praying that the Court will appoint a person to make the valuation, or otherwise ascertain it, dismissed.¹

39. The plaintiff in a bill for specific performance must show substantial compliance with the contract on his own part.² Thus a vendor, seeking specific performance, must, if required by the defendant, exhibit the title contracted for.³ So a decree for a specific performance of a contract to purchase was refused, in consequence of delay and a defect of title.⁴ So it is said, the aid of a Court of Chancery will be given to either party who claims specific performance of a contract, if it appear that, in good faith, and within the proper time, he has performed the obligations which devolved upon him.⁵ So a vendor cannot have a decree for specific performance, unless unquestionably able to give a title, which will secure full and unembarrassed enjoyment of the property.⁶ More especially, where the complainant, who seeks specific performance of a sale, has not performed his own contract, the Court will not decree specific performance, if any injury has resulted to the defendant from such non-performance.⁷ So a vendee's objections to the title need not be confined to cases of a doubtful title; but may be extended to incumbrances of every description, which may embarrass him in the full enjoyment of his purchase.⁸

40. A decree in Chancery, declaring the Court's opinion, that an agreement for the sale of land should be specifically performed by both the parties, and directing the vendee to execute a mortgage of the same land to secure the purchase-

¹ *Milnes v. Grey*, 14 Ves. 400.

² *Hoe v. Simmons*, 1 Cal. 119; *Beckwith v. Kouns*, 6 B. Mon. 222; *Garnett v. Macdon*, 6 Call, 308.

³ *Tomlin v. M'Chord*, 5 J. J. Marsh. 136.

⁴ *Watts v. Waddle*, 6 Pet. 389.

⁵ *Ibid.*

⁶ *St. Mary's, &c. v. Stockton*, 4 Halst. Ch. 520; *Garnett v. Macon*, 6 Call, 308.

⁷ *Ramsay v. Brailsford*, 2 Desaus. 582; *Beckwith v. Kouns*, 6 B. Mon. 222.

⁸ *Garnett v. Macon*, 6 Call, 308; *Butler v. O'Hear*, 1 Desaus. 382; *Reed v. Noe*, 9 Yerg. 283.

money, is to be understood, as requiring the vendor, in the first place, to make a title to him.¹

41. The same duty is exacted from a purchaser, as from a vendor, in performing his own part of the contract, before he can maintain a bill for specific performance. Thus, where a trustee's sale is made for cash, the purchaser, unless he tenders the money in reasonable time, cannot demand specific performance against the debtor, who has paid the debt and costs, especially if the purchase was obtained through the inadvertence of the debtor.²

42. So specific performance of a sale, being within the discretion of the Court, will not be enforced against a subsequent purchaser for valuable consideration, without notice; especially in favor of a vendee, who has failed to comply with his own contract, within the time limited.³

43. Questions have often arisen as to the right of specific performance, where the vendor is able to make a title to the property only *in part*. Thus, where an entire tract of land was sold, and the complainant, the vendor, at the time he filed his bill, had no legal title to a part; held, he had no right to enforce specific performance.⁴ So the Court will not decree performance of a sale, where there is a failure of title to an undivided portion of the land, which the vendee has not agreed to take at his own risk; although, if the vendor has executed a conveyance, with warranty, Chancery will not rescind the sale, but leave the grantee to his legal remedy upon the covenants.⁵ (a)

44. But equity will compel a vendor to a specific performance of a contract for the sale of land, for a part of the land,

¹ Mayo v. Purcell, 3 Munf. 243.

⁴ Reed v. Noe, 9 Yerg. 283.

² Heuer v. Rutkowski, 18 Mis. 216.

⁵ Bates v. Delavan, 5 Paige, 300.

³ Doar v. Gibbs, 1 Bai. Eq. 371.

(a) In case of a contract to purchase lots, to two of which a title could not be made, and in others there had been a deterioration in value; if the value of the remaining lots is not affected by that deterioration, a specific performance shall be decreed as to all but two. Poole v. Shergold, 2 Bro. 118.

where he has incapacitated himself from conveying the whole. And where the land contracted to be sold was held in common, and the vendor, after the agreement, divided with the other tenants in common, and executed a deed of partition, it was held that the partition was no objection to a specific performance, if the party was capable of performing the whole; but that there is a distinction in this respect, between the case where the vendee seeks to compel the vendor to a specific performance, and where the vendor resorts to equity to compel a specific performance on the part of the vendee. But a conveyance for a valuable consideration, made *bonâ fide* to a third person, without notice of the previous contract of sale, before it has been carried into execution, will transfer the legal title to such third person.¹

45. Upon a bill for specific performance, if the vendor's title to a part of the land sold is doubtful, the Court cannot compel him to make good that part, by a conveyance of land out of the same survey, to which he has an undoubted title; but will give a compensation in money. In such case, the vendor having acted in good faith in the sale, the measure of compensation is the price given, with interest, not the present value of the land.²

46. Questions have also arisen, as to the effect, upon the claim for specific performance, of a part-payment of the purchase-money. Thus, on a contract between the plaintiff and defendant for the sale of land, payment by the plaintiff was made a condition precedent to the conveyance. After a default, the defendant accepted part of the purchase-money, but the plaintiff, though repeatedly called on, refused to complete the payment. The defendant, after giving notice of his intention to do so, sold and conveyed the land to another; and the plaintiff, afterwards, tendered the money due on the contract, and filed a bill for specific performance. Held, a specific performance could not be decreed; nor could the bill be sustained for compensation.³

¹ Waters v. Travis, 9 Johns. 450.

³ Hatch v. Cobb. 4 Johns. Ch. 559.

² Kelly v. Bradford, 3 Bibb, 317.

47. We have already had occasion, (Chap. 9,) in connection with the *Statute of Frauds*, to consider the effect of *part-performance* of a verbal contract for the sale and purchase of lands, in taking such contract out of the operation of the statute. This effect is chiefly if not wholly recognized in Courts of Equity, and by applying the remedy of specific performance. The subject may therefore be properly further considered in the present connection. As has been seen, in case of possession by the vendee, valuable improvements made by him, and more especially if the price has been also paid; specific performance will be decreed, upon the ground that to refuse performance under these circumstances would be an encouragement to fraud.¹ Thus, where the vendee had possession many years with the vendor's consent, cultivated and built upon the land, without objection; specific performance was decreed, on payment of the balance of the price.² So, after part-performance, specific execution was decreed of a contract for *exchange*.³ So the defendant verbally agreed with the plaintiff, his son, that, if he would go and live on twenty-five acres of woodland, belonging to the defendant, and clear and improve such parts of it as the defendant should direct, for tilling and meadow, the defendant would, after the commencement of the improvements, convey to him in fee. The plaintiff, according to his contract, accepted the proposal, entered, cleared a large part of the tract, built on, and otherwise improved it, and continued to occupy for sixteen years. Held, the plaintiff was entitled to specific performance.⁴

48. A feme covert, being entitled, under her marriage settlement, to an interest in the settled lands for her separate use for life, with a power of leasing for any term not exceeding twenty-one years in possession, leased part of the lands for fourteen years to D., and, about a year and a half before the expiration of that lease, agreed with D. in writing, upon

¹ *Hawkins v. Hunt*, 14 Ill. 42; *Johnson v. McGruder*, 15 Mis. 365; *Gilmore v. Johnston*, 14 Geo. 683.

² *Dugan v. Cohuille*, 8 Tex. 126.

³ *Parrill v. McKinley*, 9 Gratt. 1.

⁴ *France v. France*, 4 Halst. Ch. 650.

the expiration of the lease, to grant D. a new lease upon the same terms and for the same period. The lease expired, and D. continued in possession, without taking a new lease, but doing acts on the premises, which were solely referable to the written undertaking. Afterwards, the *feme covert* died. Held, that the written undertaking was a valid execution of the power; and that the transaction amounted to an agreement, which was in part performed by the continuance of the possession, and was therefore capable of being enforced in a Court of Equity.¹

49. Upon this subject, the general principle is laid down, that although, generally, a purchaser cannot be called on for his money, until he has a title, yet, where he is let into possession upon a mutual confidence of a speedy title, and the difficulty is a mutual surprise, he cannot, without express contract, retain the possession, withholding the money.² After such part-performance, upon a bill brought by the vendor for specific execution of the contract, the usual course, in the English practice, is to order payment of the purchase-money *into Court*. Thus a vendee in possession, objecting to the title, must pay in the purchase-money, or give up possession.³ So a purchaser, who had been three years in possession, and who had not paid the purchase-money on the ground that a good title had not been made out, was ordered either to pay the purchase-money within two months, or to give up possession.⁴ And slighter acts of ownership are sufficient, where they have been committed since the discovery of an objection to the title.⁵ So a vendee in possession, objecting to the title, has been ordered to pay the purchase-money into Court, merely *on motion*. So, though possession was not admitted by the answer, and did not appear by the pleadings, but was only shown by affi-

¹ Dowell v. Dew, 1 Y. & Coll. 345.

² Gibson v. Clarke, 1 Ves. & B. 500. 385.

³ Smith v. Lloyd, 1 Madd. 83; Clarke v. Wilson, 15 Ves. 317; Dixon v. Astley, 1 Mer. 133.

⁴ Tindal v. Cobham, 2 My. & Keen.

⁵ Dixon v. Astley, 1 Mer. 133.

davit.¹ Thus a purchaser of a coal-mine was ordered, before conveyance, to pay into Court instalments due, and interest, according to the contract, being in possession of the mine and working it.² So, the defendant being in possession, and having exercised acts of ownership, payment of the money was ordered, though an infant heir was a necessary party to the conveyance.³ So, upon a bill for specific performance, filed by a vendor, it appeared that by the agreement for sale, the purchaser was to pay part of his purchase-money on a certain day, when the conveyance was to be executed, and the residue secured by mortgage, payable at not less than twelve months from the date of the conveyance. The purchaser entered into possession immediately, but, on some objections to the title, refused to pay his purchase money. More than twelve months having elapsed from the time when the conveyance ought to have been executed, the defendant was on motion ordered to pay the purchase-money into Court.⁴

50. A purchaser (a trustee, acting on behalf of himself and others, his co-trustees, and of the *cestui que trusts*) was ordered to pay the purchase-money into Court, the agreement having been entered into in the name of himself alone; upon affidavits that the plaintiffs (the vendors) had no notice of his acting for others, and of acts of ownership committed since possession given to him under the agreement, in opposition to the answer, alleging notice and denying any acts of ownership by himself or by any other person, to his knowledge.⁵

51. So a purchaser in possession, who has made alterations and improvements on the estate, will be ordered to pay the purchase-money into Court.⁶ So acts of ownership, amounting to waste, by alteration and conversion of property, are sufficient to induce the Court to order payment of the pur-

¹ Boothby v. Walker, 1 Madd. 197; Blackburn v. Stace, 6 Madd. 69; Burroughs v. Oakley, 1 Meri. 52.

² Buck v. Lodge, 18 Ves. 450.

³ Bradshaw v. Bradshaw, 2 Mer. 492.

⁴ Younge v. Duncombe, You. 275.

⁵ Crutchley v. Jerningham, 2 Mer. 502.

⁶ Bramley v. Teal, 3 Madd. 219.

chase money into Court, upon the ground that a vendor has a lien on the estate for the amount, and might have filed his bill to restrain such acts; and, though the bill contained no charge of such acts, the order was made on an affidavit, supplying the fact, the defendant not having answered, nor being in contempt, nor under any order for time.¹

52. There is, however, as has been seen, (Chap. 9,) a class of cases, which very much restrict and qualify the rules above laid down, as to the effect of part-performance upon parol contracts. Thus it is held, that specific performance will not in such case be decreed, unless such a change has been thereby caused, as makes it difficult to put the vendee in *statu quo*.² So, in order to enforce specific performance, the contract must be clear, definite, and unequivocal, and be proved as alleged, by competent evidence, and the acts of part-performance must also be clear and definite, and apply exclusively to such contract.³ Thus, in case of an alleged parol contract of sale, evidence was offered, on one side, of possession, and of the declaration of the former owner, under whom both parties claimed, that he had made such a contract, and, on the other, that the party in possession had said, he "only had the use of the land." Held, the evidence was too uncertain to authorize a decree for specific performance.⁴ So it has been held, that equity will not enforce a parol gift of land from father to son, though possession has been taken, either as against the donor or his heirs, executors, &c.⁵ So specific performance of a parol sale, proved by one witness, and confirmed by taking possession and acts of ownership, was refused; there being some inconsistencies in the testimony of the witness, which, with other circumstances, placed the terms of the contract in doubt.⁶ So a vendee cannot enforce specific performance, by showing a receipt for part of the price, which designates the land,

¹ Cutler v. Simons, 2 Mer. 103.

² Dugan v. Cohuile, 8 Tex. 126.

³ Mundorff v. Howard, 4 Md. 459 ;
Charnley v. Hansbury, 13 Penn. 16.

⁴ Rankin v. Simpson, 19 Penn. 471.

⁵ Pinckard v. Pinckard, 23 Ala. 649.

⁶ Reynolds v. Waring, You. 346.

but not the price or other terms of sale.¹ So specific performance will not be decreed of a parol contract, made by husband and wife, for the sale of the wife's estate, where a deed has been executed by both, if the wife die before the deed be delivered, or the estate taken possession of by the vendee, or the purchase-money paid.² So, in case of an oral agreement for the sale of land, the parties went together to an attorney and had a deed drawn, the grantor signed it, the grantee paid part of the consideration, and, after both parties had examined the deed and expressed themselves satisfied with the form, the grantor took it for the purpose of procuring a release of dower. Held, as there had been no delivery, the deed was invalid as such, and could not for the same reason be enforced as an agreement in writing.³ (a)

¹ *Soles v. Hickman*, 20 Penn. 180.

² *Parker v. Parker*, 1 Gray, 409.

³ *Leland's Appeal*, 13 Penn. 84.

(a) Many cases are found in the books, not arising from a claim for specific performance, in which the same restrictions have been recognized, upon the effect of part-performance of parol contracts. Thus the defendant had entered into an agreement for sale of his estate, and had received part of his purchase-money; after which an extent issued against him. Held, as he had not executed any conveyance, the fee was in him, and the agreement had no operation against the extent. *Rex v. Snow*, 1 Price, 220 n. So, where a party takes possession of land, under an alleged parol agreement to convey, and afterwards attorns to the vendor by taking a written lease, he is held to occupy under the lease, and forfeits his rights by virtue of possession under the agreement; even though the object of the lease was to protect the property of the party in possession from his creditors. *Rankin v. Simpson*, 19 Penns. 471. So, where a purchaser had paid part of the purchase money, and was let into possession, but the vendor had not executed any conveyance; held, a mere tenancy at will in the former, and the latter, having made a demand of possession, to determine the tenancy, might recover the lands by ejectment. *Doe v. Miller*, 5 Carr. & Payne, 595. So a parol agreement, made by the owner of land with an owner of adjacent land, to straighten the line by the removal of an old crooked fence therefrom, and the erection of a new and straight fence in its stead, may be revoked at any time before such new fence shall be completed; and, if the adjacent owner persists in erecting such new fence, after having notice to desist, he will be liable to an action of trespass, and cannot sustain a plea of

53. Although, in general, as has been seen, a purchaser shall not retain possession of the estate and also keep his purchase-money; yet, where he is willing to give up possession, and it is a question whether there is or not a subsisting contract, Chancery will not order payment of the purchase-money into Court.¹ So it has been held, that a vendor, permitting the vendee to take possession before completion of the title, without any stipulation as to the purchase money, cannot, *on motion*, have the purchase-money paid into Court.² So a motion by one tenant in common, who had agreed to sell to the other, that the latter should pay his purchase-money into Court, was refused; where such purchaser had been, before and at the time of the purchase, in possession of the whole, with the approbation of the vendor.³ So it is held, that, on a bill by a vendor for specific performance, the Court will not, before answer, make an order for payment of the purchase-money by the defendant in possession, unless under special circumstances, such

¹ *Morgan v. Shaw*, 2 Mer. 138.

³ *Freebody v. Perry*, Coop. 91.

² *Clarke v. Elliott*, 1 Madd. 606.

liberum tenementum, by any parol admissions, or other parol evidence, that the true boundary line was always understood to be a straight one. *Davis v. Townsend*, 10 Barb. 333.

And the effect of mere *possession*, as a waiver of any objections which might otherwise be made to the enforcement of a contract, has been in like manner restricted with reference to subjects not specially connected with real estate. Thus it is held, that the purchaser of a share in a copartnership business does not waive objections to the title, by taking possession of the property and acting as a partner, when the contract stipulates that a good title shall be made by a specified future day, and it appears to have been the intention of the parties, that the purchaser should immediately, and before that day, have the possession. In this case, the vendor filed a bill against the purchaser, who had taken possession, charging that he had grossly mismanaged the property and destroyed its value, and praying that he might be declared to have accepted the title, and decreed to perform the contract specifically. Held, the title had not been accepted, and, as a good title was not shown, a specific performance could not be decreed. *Stevens v. Guppy*, 3 Russ. 171.

as unreasonable delay, committing acts of ownership in alteration of the property, &c.¹ So, where the defendant is in possession, not under the agreement to purchase, but as tenant to the plaintiff, or independently of the agreement at the time of the purchase, no such order will be made.² More especially on motion, and where there had been laches on the part of the vendor in completing his title.³

54. According to the bill, a parol agreement was for the sale, and possession had been given, of *five* acres. According to the answer, of *three* acres only. A motion, that the purchase-money for the five acres, or otherwise for the three acres, might be brought into Court, was refused.⁴ (a)

55. With regard to the pleadings and general course of practice in bills for specific performance; it is held that, if the defence depends merely on want of title in the vendor, the defendant ought to rest on his answer, and not file a cross-bill to have the contract delivered up, or to prevent an action; for the plaintiff cannot succeed at law.⁵

56. If a defendant pleads the Statute of Frauds to a bill for specific performance, he must by answer deny the agreement. His admission takes it out of the statute.⁶

57. The plaintiff, whilst a papist, assigned an advowson to the defendant, for ninety-nine years, and, having conformed, brought his bill for a re-assignment of the term,

¹ Bonner v. Johnston, 1 Mer. 366.

² Ibid.

³ Fox v. Birch, 1 Mer. 105.

⁴ Benson v. Glastonbury, &c. C. Coop. 350.

⁵ Hilton v. Barrow, 1 Ves. 284.

⁶ Child v. Godolphin, 1 Dick. 39.

(a) A similar principle to that stated in the text has been applied to a claim for the rents and profits of the estate, after occupation by the purchaser; the vendor failing to make a good title. Thus, on a bill by a vendor for specific performance, where the purchaser had in 1814 entered into possession, and, pending the suit, continued in possession until 1823; the plaintiff, in consequence of a defect in the title, failing in his attempt to compel performance, the Court refused to decree, under the prayer for general relief, an account of rents and profits against the purchaser, though he had stated by his answer, that he was willing to pay a fair rent. Williams v. Shaw, 3 Russ. 178.

suggesting that he had only assigned it in trust for himself, and to avoid the penalties of 3 Jac. 1 and 1 W. & M. The defendant pleaded the Statute of Frauds in bar to the discovery, but by his answer admitted that the advowson was assigned to him for the purposes charged. Held, the plea must be overruled, being coupled with an answer which admits facts.¹

58. The bill prayed execution of an agreement. The defendant denied this agreement, but admitted a different one. Bill dismissed, without prejudice to a bill for performance of the admitted agreement.²

59. Though a defendant in a bill for specific performance may have a decree for performance according to his construction, if adopted by the Court, without a cross-bill; the decision being not according to his construction, but only that he had contracted under mistake, created by the plaintiff, the bill was merely dismissed.³

60. It seems, the Court will not, on motion, decide upon the validity of any other objection than defect of title, which may be raised by the answer to a bill for specific performance, but reserve it to the hearing.⁴

61. Bill for specific performance of a parol agreement to renew, plaintiff having built a house. The only witness for the plaintiff proved an agreement different from that in the bill, and the defendants by answer stated an agreement different from both. Held, in strictness, the bill ought to be dismissed; but specific performance was decreed, according to the answers, with costs against the plaintiff.⁵

62. Specific execution of a parol agreement for a lease for three lives, proved by one witness, was refused; the answer admitting an agreement for one life only, supported by the testimony of one witness, and not being inconsistent with the evidence of part-performance given by the plaintiff.⁶

63. Bill for specific performance of an agreement to con-

¹ *Cottington v. Fletcher*, 2 Atk. 155.

² *Lindsay v. Lynch*, 2 Scho. & Lef. 1.

³ *Higginson v. Clowes*, 15 Ves. 516.

⁴ *Gordon v. Ball*, 1 Sim. & Stu. 178.

⁵ *Mortimer v. Orchard*, 5 Ves. 243.

⁶ *Lyndsay v. Lynch*, 2 Scho. & Lef. 1.

vey. The complainant alleged payment of part of the purchase money, under a verbal agreement, prior to the written contract. A feigned issue was awarded, to try the question of payment, and the jury found the fact. Held, the defendant, having acquiesced in the feigned issue, and controverted the fact at the trial, could not afterwards object to the decree allowing the payment.

64. So, where the agreement was, that A. and B. should sell and convey to C., and the payment was made to A., who had no legal title; held, B. could not afterwards object to such payment, but it was to be considered as made to B.¹

65. A. conveyed to B. a tract of land, reserving "the house and garden." It was agreed by the parties, that the use of the "door-yard" and "firewood" should also be reserved to A. for life; but this latter agreement was not inserted. B., on discovering the omission, offered to have it corrected, which offer A. refused, and refused to fulfil the contract. B. filed his bill for a specific execution on the terms of the original agreement. Held, that the case was not within the Statute of Frauds, B. not seeking a decree for more than he was entitled to by his written contract, but less; and that a conveyance should be decreed to B. on payment of the purchase-money with interest, deducting a reasonable sum for the profits of the land from the time he was entitled to possession under the contract.²

66. Where the Court, on a bill for specific performance, passed a decree, ordering execution of a good deed with the usual covenants of seisin and warranty; held, the import of the agreement was, to convey the land by deed, so as effectually to transfer an unincumbered title in fee; that, to effect such transfer, a deed with such covenants was not necessary; and, as the decree transcended the agreement, it was erroneous.³

67. Specific performance was decreed, with costs, where

¹ *Waters v. Travis*, 9 Johns. 450, 464, 465.

² *Baxter v. Brand*, 6 Dana, 296.

³ *Lodd v. Seymour*, 21 Conn. 476.

the defendant, objecting to the title, had been served with notice of a prior decision, in a different cause, in favor of the same title, against a similar objection.¹

68. Bill for specific performance of a sale of land in Cincinnati. The complainant had purchased the lot, and had paid, according to the contract, the proportion of the purchase money payable to the defendant. By the contract, a deed with general warranty was to have been given by the vendor within three months, and a mortgage for the balance of the purchase-money executed by the purchaser. This deed was never given or offered. The purchaser took possession of the lot, built on it, and sold a part of it. A subsequent agreement was made with the vendor, as to the rate of interest to be paid on the balance of the purchase-money. The purchase was made in 1814, and the interest as agreed upon was regularly paid until 1822, when it was withheld. In 1822, the vendor brought ejectment for the property, and obtained possession in 1824. In 1819, the purchaser was informed that one C. and his wife had a claim on the lot, which was deemed valid by counsel; and in 1823 a suit for recovery of the lot was instituted by C. and wife against the complainant, the defendant, and others, which was pending until after 1829. In 1825, this bill was filed, claiming a conveyance under the contract of 1814, on payment of the balance of the purchase-money and interest. The Circuit Court decreed a conveyance; and the decree was affirmed by the Supreme Court.²

¹ *Biscoe v. Wilks*, 3 Mer. 456.

² *Taylor v. Longworthy*, 14 Pet. 173.



THE LAW
OF
VENDORS AND PURCHASERS
OF REAL PROPERTY.

BY
FRANCIS HILLIARD,
AUTHOR OF THE LAW OF MORTGAGES, ETC.

IN TWO VOLUMES.

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ERRATA.

- Vol. I. p. 50, 11th line from top, for *rents* read *rests*.
 109, 13th " " for *plaintiff* read *defendant*,
 112, 16th " " for *purchase* read *sell*.
 120, 3d line from bottom, dele *But*.
 137, 2d " " for *plaintiff* read *defendant*.
 173, 6th line from top for *apparent* read *variant*.
 228, 19th " " for *so* read *but*.
 280, 11th line from bottom, after *term* add *for thirty-two years*.
 438, 11th " " for *plaintiff* read *defendant*.
 Vol. II. p. 59, 16th " " for *24th* read *14th*.
 65, 10th " " for *latter* read *former*.
 188, 2d " " dele *not*.
 212, 5th " " for *B.* read *H*.
 228, 16th line from top, for *it* read *he*.
 228, 20th " " for *plaintiff* read *defendant*.

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THE LAW

OF

VENDORS AND PURCHASERS.

CHAPTER XXVI.

GENERAL REMEDIES OF VENDOR AND VENDEE IN LAW AND EQUITY.—MUTUALITY OF THEIR RESPECTIVE RIGHTS AND CLAIMS.—WHETHER THE VENDOR CAN RECOVER THE PRICE WITHOUT TENDERING A GOOD TITLE.

1. HAVING now completed the consideration of the remedies between vendors and purchasers of real property peculiar to *Courts of Equity*, we proceed to speak of the general grounds of action and defence in relation to contracts of sale and purchase, and the course of proceeding in the progress of suits brought to enforce them, on the one side and the other. The remark already made may be here repeated, that many of the rules and principles, which we shall now have occasion to state in detail, have of necessity been more cursorily suggested in the preceding pages of this work. This remark is peculiarly applicable to the subject of *title*, which was treated at some length in immediate connection with the *contract* of sale and purchase, (Chap. 12,) but has a still more intimate relation to the remedy provided by law for breach of that contract.

2. The general principle—equally a rule of law, equity, and moral justice—has been already stated, (Chap. 12,) that the rights and duties of the parties to a sale and purchase of real property are *mutual* or *reciprocal*; that the vendor cannot claim the price without having conveyed, or offered to convey the land; nor the vendee the land without having paid or offered to pay the price. (a) Upon the same general grounds, in more immediate connection with the remedy, it is said to be a universal rule of equity, that he who asks for a specific performance must be himself in a condition to perform. Therefore the vendor, being unable to make a title free from incumbrances, is not entitled to a decree for specific performance.¹ So, under a contract to purchase land, generally, good and sufficient titles must be delivered or tendered before the purchase-money can be recovered.² So a covenant by the vendee to pay, and of the vendor to convey upon payment, are dependent covenants; (b) and an

¹ *Morgan v. Morgan*, 2 Wheat. 290,
299.

² *Tharin v. Fickling*, 2 Rich. 361.

(a) The same general principle has been applied, in case of a contract relating to real and personal property, to the title of the latter, and as between the vendee and a third person. Thus the plaintiff let a house and the furniture therein for six months. During that period, the plaintiff and the lessee entered into a written contract, whereby the plaintiff agreed to sell the house and furniture to the lessee, the purchase-money to be paid on completion of a good title by the plaintiff. Before completion of a good title, the contract was rescinded by consent of both parties. Held, the furniture never vested in the lessee, and therefore could not be taken under an execution against him. *Lanyon v. Toogood*, 13 Mees. & Wels. 27.

(b) The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties. *Balch v. Smith*, 12 N. H. 444. And this intention is to be sought for, rather in the order of time in which the acts are to be done, than from the structure of the instrument. *Goodwin v. Lynn*, 4 Wash. C. C. 714.

Though dependent in form, the covenants will be construed as independent, when necessary to effect justice. *Todd v. Simmons*, 2 Gratt. 167. Hence a party, having covenanted to do two things, one of which he has done, may maintain an action for the part done, as upon an independent covenant. But, if the failure of the plaintiff to perform any of his cov-

action to compel payment cannot be maintained, without proof of a previous tender of a conveyance.¹ So, if one party covenants to convey land to the other within one year, at an agreed price per acre; and the other to pay the same price within the same time; the covenants are dependent, and neither party can maintain an action against the other, without proof that he was ready and willing to perform on his part at the proper time.² So it is held, that a purchaser discovering an incumbrance may retain so much of the price.³ So a purchaser (though with warranty) will not be compelled to receive a title and pay the purchase-money, if an apparently valid adverse title has been asserted; and, if there is no probability that the claim purchased will prevail, equity will enjoin the payment of the purchase-money, and dissolve the contract.⁴ So, where a purchaser stipulates to pay the residue of the purchase-money on a day specified, upon the vendor's making a good title, or, otherwise, if such title should not be completed, upon his executing a bond to complete such title, and to convey the estate as soon as the same could be completed; the vendor is bound to show a good title; and, till a good title is shown, the purchaser, though he had entered into possession, is not bound to pay the purchase-money.⁵ So, where the legal title cannot be conveyed, and the vendee must resort to a Court of Equity to establish his title, notwithstanding a conveyance of all the right of the vendor to him, the Court

¹ Adams v. Williams, 2 W. & S. 227.

⁴ Young v. Lillard, 1 Marsh. 482;

² Low v. Marshall, 17 Maine, 232; Marlow v. Marlow, 2 P. Wms. 199.

Lawrence v. Dole, 11 Verm. 549.

⁵ Clarke v. Faux, 3 Russ. 320.

³ Troughton v. Troughton, 1 Ves. 88.

enants has been injurious to the defendant, the latter may set up this injury as a defence *pro tanto*. Ibid. (See Chap. 28.)

In a contract between parties, relative to the same subject, some stipulations may be mutual and independent, and others dependent and mutually conditional. Thus the plaintiff, without having tendered performance on his part, recovered on a breach of one covenant, because it was independent, and failed on the other because it was dependent. Kane v. Hood, 13 Pick. 282; Couch v. Ingersoll, 2 Pick. 292.

will not compel him to pay the purchase-money, and thus take a *lawsuit* instead of the land.¹ So, where a vendor covenants to give a deed on a certain day, and the purchaser covenants on the same day to pay part of the consideration, and give security for the residue, the covenants are dependent, and neither party can maintain an action, without averring performance, or readiness to perform, on his part.² So, where a sale has been in part executed by a conveyance of part of the land, and the vendor is unable to convey the residue; equity will decree repayment of a proportionate part of the purchase-money, with interest.³

3. Upon the same principle, where a party agrees to convey land, upon performance by the purchaser of certain conditions, and designedly incapacitates himself to convey, the purchaser is discharged from the conditions.⁴ And, if a party who has agreed to sell an estate is afterwards disabled from doing so, the vendee may recover the money deposited in an action for money had and received, although the contract for the sale be under seal.⁵ So a contract, that one party shall remain with the other and carry on his farm until the decease of the latter, and shall then receive the farm in compensation of his services, is broken by a sale of the farm or a part of it by the owner, although for the purpose of paying an antecedent debt; and, the special contract being at an end, the party who has rendered the service may recover the value of it in an action upon the common counts.⁶

4. Action on a contract, to pay the plaintiff for certain land \$1,500, "payments as follows: \$200 cash; \$300 in negro property; the balance of \$1,000 to be paid in one, two, and three years, bearing interest from the time of possession, and giving approved personal security with a mortgage on the premises, to secure the payment of the \$1,000."

¹ Bank, &c. v. Hagner, 1 Pet. 455.

² Garley v. Price, 16 Johns. 267.

³ Pratt v. Law, 9 Cranch, 494.

⁴ Miller v. Whittier, 32 Maine, 203.

⁵ Greville v. Da Costa, Peake's Add. Ca. 113; Judson v. Wass, 11 Johns. 525.

⁶ Canada v. Canada, 6 Cush. 15.

Shortly after the contract was executed, the defendant entered on the land, and cultivated it for one year. The action was for the first payment of \$500. Held, the plaintiff could not recover, without proof that he had executed and tendered titles to the defendant, before action commenced.¹

5. The defendant, on the 6th of December, 1841, agreed in writing to purchase from the plaintiff his farm, called the cottage portion of Magnolia Farm, for \$3,000, to be paid as follows: \$1,500 on the 1st of January, 1842; \$1,000 in twelve months, and \$500 in eighteen months after that date; each of the two latter sums to draw interest from the above stated periods, or date of the bond. At the time the agreement was made the premises were under mortgage, and, in May, 1842, were sold under a decree of foreclosure, pronounced against the plaintiff in January, 1842. Held, the plaintiff, in order to recover on the contract, should have removed the incumbrance and tendered to the defendant titles to the farm. Also, that the plaintiff could not show by parol, that the defendant knew of the mortgage, and that the agreement was entered into with a view to raise money to pay it off.²

6. The plaintiff sold to the defendant a lot for \$700, agreed to make a pavement in front of the property, and to clear all incumbrances; and was to receive the \$700, on giving a good and sufficient deed. The contract was dated 17th June, 1836, and the defendant was to receive the rent from July 1st; but, if the deed was not given by that day, the plaintiff was to receive the rent until he gave a good deed. Held, the payment and conveyance were to be concurrent; and a declaration, alleging that the plaintiff was at all times ready to execute, and did execute and offer to deliver, a good and sufficient deed, before the action was instituted, was, after verdict, equivalent to an allegation of seizin in the plaintiff.³

¹ Breithaupt v. Thurmond, 3 Rich. 216.

² Tharin v. Fickling, 2 Rich. 361.

³ Ragan v. Gaither, 11 Gill. & Johns. 472.

7. By the conditions of a sale by auction of a copyhold, it was stipulated that the purchaser should pay down a deposit, and sign an agreement for payment of the remainder of the purchase-money at a certain time, on having a good title, and that he should have a proper surrender of the estate, on such payment. Held, in order to maintain an action, the seller must not only allege that he had been always ready and willing, and frequently offered, to make a good title and a proper surrender on payment of the purchase money; but also actually made a good title, and surrendered the estate to the purchaser, or a tender and refusal; and also what title the seller had.¹

8. By an agreement under seal for sale and purchase of land, the defendant covenanted to pay \$250 on a certain day, and the plaintiff covenanted, that, upon performance of the covenant of the defendant, he would "execute to him, his heirs and assigns, a good warrantee deed of conveyance." The declaration alleged, that the plaintiff was, and had been at all times, ready and willing, on payment of the \$250, &c., to execute a good warrantee deed of conveyance, &c., but that the defendant did not pay the \$250, &c. Pleas, that the plaintiff was not seized, &c., and had no title; and that the plaintiff did not on the day appointed, nor at any time since, tender or offer to execute a good warrantee deed of conveyance. Held, the covenants were dependent; that the words, "a good warrantee deed of conveyance," referred to the instrument of conveyance only, and not to the title; that the first plea was not sufficient, because to an action on a deed or specialty, mere failure of consideration is no defence at law. But that the second plea was good, for the vendor cannot maintain an action for the purchase-money, without having executed or actually tendered a conveyance.²

9. The plaintiff agreed to sell the defendant his estate for a certain sum before a particular day, in consideration whereof the defendant agreed to pay that sum on the day,

¹ Phillips v. Fielding, 2 H. Bl. 123.

² Parker v. Parmele, 20 Johns. 130.

and, on failure, to pay £21. Held, the covenants were dependent; and the plaintiff could not recover the £21, without showing a conveyance on his part, or a tender of one.¹

10. The plaintiff covenanted to sell to the defendant a school-house, &c., and to convey the same to him on or before the 1st of August, and to deliver possession in June, and, in consideration thereof, the defendant covenanted to pay the plaintiff £120, on or before the 1st of August, 1797. Held, the covenants were dependent covenants; and the plaintiff could not maintain an action for the £120, without averring that he had conveyed or tendered a conveyance.²

11. The defendant, in consideration of the covenants of the plaintiff in the same deed, covenants that he will purchase certain lands of the plaintiff, then in possession of the defendant, and will pay for the same a certain sum in four years, with interest annually; and the plaintiff covenants that he will deliver to the defendant a conveyance of the land, upon his paying the said sums at the time or times mentioned. Held, the plaintiff might recover the interest at the end of each of the three first years, by way of rent; but not the fourth year's interest, nor the principal, without making a tender of the conveyance.³ Jackson, J., says: "The defendant was to pay his money *for the land*; he did not intend to pay at the end of the four years, if the plaintiff should then refuse to deliver the deed. On the other hand, the plaintiff's intestate was to deliver the deed *upon* receiving the money; he did not intend to convey the land, unless the defendant should pay the money. These were mutual conditions, and neither party could complain of the default of the other, until he had offered to perform his part of the agreement. The defendant was already in possession of the land to be conveyed, at the time of executing the instrument. It appears that he was to continue in possession during the four years. He would receive the consideration for which

¹ Goodisson v. Nunn, 4 T. R. 761.

³ Gardiner v. Corson, 15 Mass. 504.

² Glazebrook v. Woodrow, 8 T. R.
366.

this interest or rent was to be paid, whether the land was finally conveyed to him or not; and he therefore covenants to pay it, without reference to the expected conveyance. This interest, therefore, does not appear to us to be a substantial part of the price. The price was to be paid, when he received the deed; the deed not having been delivered nor tendered, the plaintiff cannot recover the price. But the plaintiff was entitled to sue for and recover the interest, at the end of each of the three first years; and nothing has since occurred to bar that right. As to the interest for the fourth year, that was to be paid, together with the principal, on receiving the deed. In one view, this may be considered to be equitably due, as much as the interest for the three preceding years. But the parties have thought fit to make the last payment of interest, as well as the payment of the principal sum, depend on the condition of his receiving a deed at that time."

12. The general rule above stated is recognized, even where the facts of the case do not admit its application. Thus a bond was given to sell and convey certain land, upon payment of a certain sum, by a good and sufficient deed of warranty, and to procure the wife of the grantor to release her dower. Held, if the grantor was seized, and the deed tendered was duly executed, with proper covenants of warranty, the penalty was saved, although the land was incumbered by a mortgage. The Court say: "The import of these words is confined to the form of the deed and its execution, and not to the title. If the money was to be paid on receiving the deed, it might be a reasonable construction, that a good and sufficient title should be conveyed; otherwise the purchaser might part with his money, not merely for the land, but for a lawsuit also. In the present case, however, the money was to be first paid, and the plaintiff might as well sue on the covenants in his deed, as on his bond." ¹

¹ Aiken v. Sanford, 5 Mass. 494, 499.

13. But, where it was stipulated, in a contract for the sale of a farm, that part of the price should be paid when the deed was ready, and the residue in annual instalments; held, the vendor could not claim any part of the price till a tender of an unincumbered title; and, there being a mortgage on the farm, that tender of a warranty deed was insufficient. Wilde, J., says, "the agreement of the plaintiff was to convey the farm, which must be construed as an agreement to convey a good title free from all incumbrances. There is a material distinction between the case at bar, and that of *Aiken v. Sanford*.¹ (s. 12.) In that case the condition of the bond was, to convey by a good and sufficient deed of warranty, and the deed was not to be given until after the payment of the purchase-money. And the Court say, "that if the money was to be paid on receiving the deed, it might be a reasonable construction, that a good and sufficient title should be conveyed." That such is the law, we think very clear according to all the authorities."²

14. The advertised terms and conditions of an auction sale of land were, that warranty deeds should be given; that purchasers should have ten days to examine the title; that upon these terms the vendor would convey to purchasers, who should make their payments and take their deeds, within twelve days from the sale, provided the deeds conformed to the conditions. The defendant, a purchaser, having ascertained that the vendor had no record title, except a mortgage made to the person from whom he bought, and that the latter derived his title in part from one whose wife did not appear by the record to have released her dower, refused to make payment and receive a warranty deed. Held, as the title was defective, the defendant was not bound to take the deed. Fletcher, J., says, (in substance,) "By a reasonable and just construction of the contract, the plaintiffs were bound to make a good and clear title. Ten days were allowed purchasers to examine the title. Pur-

¹ 5 Mass. 494.

² *Swan v. Drury*, 22 Pick. 489.

chasers could have no other object in examining the title, than to see if the plaintiffs could make a good title; and there could be no object in ascertaining this, unless they were bound to make such title. The purchaser was allowed time to examine the title, to see if he could get what he had purchased, and whether the plaintiffs actually had and could convey what they had undertaken to sell. Upon examining the title, the defendant ascertained, and such clearly was the fact, that the plaintiffs could not convey a good and clear title. The land was incumbered, and the defendant was not bound to take and pay for an incumbered estate. The defendant did not contract for a deed only; he contracted for and purchased the land. The plaintiffs undertook to make to the defendant a good and clear title to the land.”¹

15. A. agreed to convey to B. a farm on which C. lived, on the 1st of May, 1811, and B. covenanted to pay to A. on that day \$500, part of the purchase-money. On the day appointed, A. tendered a deed, executed by A. and his wife, not acknowledged by the wife, and which did not embrace all the farm. Held, the covenants were dependent, and delivery of the deed and payment of the money were concurrent acts. Also, that this tender was not a performance of the covenant of A.²

16. By articles of agreement between the plaintiff and defendant, the plaintiff, for the consideration thereafter-mentioned, covenanted to execute and deliver to the defendant, on the 1st of May, 1806, a good and sufficient deed of eighty-four acres of land, and the defendant covenanted to pay to the plaintiff \$1,000 on the 1st of May, 1806, and \$875 on the 1st of May, 1812. In an action for the \$1,000, held, these were dependent covenants, and the plaintiff must deliver or tender a deed to the defendant, before he could bring this action.³

17. Declaration, that it was agreed between the plaintiff

¹ *Mead v. Fox*, 6 Cush. 199, 201, 202.

² *Jones v. Gardner*, 10 Johns. 266.

³ *Greene v. Reynolds*, 2 Johns. 207.

and defendant, that the plaintiff should purchase two houses of the defendant for the residue of a term of years, &c.; that the defendant should paper them, &c.; that the plaintiff should pay part of the purchase-money on completion of the conveyance, and that the defendant should make a good title. The agreement was as follows: “(The plaintiff) having agreed to purchase of (the defendant) two leasehold houses, &c.; (the defendant) hereby agrees to paper, &c., (the plaintiff) to pay, &c., at the time of the conveyance, &c.” Held, the agreement to purchase, though recited as an existing agreement, was to be considered as part of the agreement produced; also, that there was no variance on the ground that the agreement was silent as to the title, the contract to make a title being implied.¹

18. By an indenture dated in March, A. agrees to give B. 450 acres of land in Ridgeville, Ohio, the land to be as good as C.’s, and B. is to receive in addition \$200 at or before the 1st of July, and A., as agent of D., is to receive therefor certain lands of B., the possession to be given of B.’s land by the 1st of April, and B. is to make his selection after E., C., and F., which selection is to be made by or before the 1st of July, and in consequence of B.’s not satisfying himself, then G., H., and I. shall average, if he chooses the land above-mentioned according to the above contract, or refuses to select, himself, and if the said lands should not prove to be as good as the average of lands in that vicinity of towns, then this contract to be void. Held, that the covenant of B. to deliver possession by the 1st of April was an independent covenant; that A. might declare for a breach of it without taking any notice of his own covenants; and that it was insufficient to plead, that the land in Ridgeville, from which B. might have made his selection, was not as good as C.’s, or that A. was not the agent of D., or not authorized by D. to make the contract or to prosecute the action, or that D. had no land in Ridgeville. Held also, that the cov-

¹ Hall v. Betty, 4 Mann. & G. 410.

enants to convey were mutual dependent covenants, and that A. should have averred performance on his own part, or an excuse for non-performance; and that, B. having omitted to select by the 1st of July, the payment or tender of the \$200 was a condition precedent to A.'s right to demand a deed of B., and should have been averred.¹ Wilde, J., says: "The principal object of the contract was the exchange of lands. No time was appointed for making the conveyances, but as the one conveyance was the consideration of the other, we cannot doubt that it was the intention of the parties that both should be made at the same time. The plaintiff declares that the defendant's covenant was to have been performed within a reasonable time; but it cannot be held reasonable that the plaintiff should require the defendant to perform his covenant, before the plaintiff should be ready to perform his. If the parties had intended that any such advantage of priority should be secured to either party, it would have been expressed in the deed. It has been argued, that the defendant was bound to convey at the same time he was to deliver possession; but it is manifest from the language of the deed, that such was not the intention of the parties. The two conveyances were to be concurrent acts, and the covenants are therefore dependent. But this point does not appear to be material. For if the plaintiff was prevented from performing his covenant by the neglect of the defendant, it is equivalent to performance by the plaintiff. Now it is clear that no conveyance could be made by the plaintiff, before the selection of the lands was made, and this selection was to be made by the defendant. If he refused to make it, it was incumbent on him to give notice, that the selection might be made by the three commissioners. This defect in the declaration, however, is not material, because on another ground the declaration is defective. It is stipulated in the deed, that the plaintiff should pay the sum of \$200. If this payment

¹ Couch v. Ingersoll, 2 Pick. 300.

was to be made previous to the time when the conveyances were to be made, or at the same time, it is very clear that the plaintiff cannot recover without averring that he paid or tendered payment of the money. This payment was to have been made the 1st day of July, nearly a month before the time when a deed was demanded, and before the time contemplated by the parties for the performance of the principal covenants. The defendant was not obliged to make the selection before the 1st day of July; and if not then made a further time was allowed, that it might be made by the men appointed for that purpose. When the plaintiff demanded a deed of the defendant on the 30th day of July, he was obligated to pay or tender payment of the \$200."

19. Agreement, that the defendant should have certain land, in consideration of which he was to pay the plaintiff a certain sum in three instalments, the deed to be executed at the completing of the last payment. Held, the agreement to pay the first two instalments was independent, but the agreements of the defendant to pay the last instalment, and of the plaintiff to execute and deliver the deed, were mutually dependent and conditional. Shaw, C. J., says: "Where the whole purchase-money is to be paid at once, and the deed is to be then given, the covenants are held to be dependent, because it is unreasonable to presume that the purchaser intended to pay the whole consideration, without having the equivalent, in a title to the land purchased. The same reason applies to the last instalment. An obvious reason why the first and second instalments should be paid without having a deed is, that the vendor was to withhold the title, as a security for the purchase-money, and the vendee was content to rely on the vendor's contract for his future title; but no such reason applies to the final and complete payment of the purchase-money."¹

20. The particular requisites of a good title will be considered in the next chapter.

¹ Kane v. Hood, 13 Pick. 281, 283.

CHAPTER XXVII.

REQUISITES OF A VALID TITLE.

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| <ul style="list-style-type: none"> 1. In what a valid title consists. 2. A <i>doubtful</i> title is insufficient. 6. Qualifications of the rule. 10. <i>Legal</i> or <i>equitable</i> title. 13. Title by <i>deed</i>. 19. By <i>recovery</i>. 20. By destruction of <i>contingent remainders</i>. 21. By will, and other assurances connected with the <i>estates of persons deceased</i>. | <ul style="list-style-type: none"> 33. Title in case of <i>leasehold</i> interests and <i>rents</i>. 41. Title as affected by <i>judgments</i>, &c. 47. Title as connected with <i>bankruptcy</i>. 50. <i>Presumption</i> of title. 54. Title by <i>limitation</i> and <i>lapse of time</i>. 57. Title derived from <i>married women</i> and <i>infants</i>. 63. Miscellaneous questions of title. —Time allowed for perfecting a title. |
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1. HAVING in the last chapter considered the general obligation of a vendor to furnish a good title, in order to maintain a suit for the price, we shall hereafter state the few exceptions and qualifications to this rule, growing out of the language of the contract, the intention of the parties, and the circumstances of the case. Before proceeding, however, to this part of the subject, the natural succession of topics demands a summary view of the various forms or modes in which a title, such as the vendor is required to make, may exist, or of the assurances and transfers by which it may be created. As has been already stated, (p. 215,) a full analysis of the subject of title to real property is appropriately to be found in treatises upon *executed alienations*, such as *inheritance*, *deed*, or *devise*, and not in a work like the present, which relates wholly to *executory contracts*. The brief abstract, however, which we propose to present, of the elements that enter into a good title, seems to be necessary, in order to perfect and make intelligible the general proposition, that such a title is demanded from the vendor.

2. As has been already stated, (Chap. 25,) it being in the discretion of the Court to decree specific performance of an agreement for a purchaser, or to leave it to law; a purchaser will not be compelled to take a doubtful title.¹ (a) More especially if the contract is for an *indefeasible title*.² Nor will a case be directed without his consent.³ And a purchaser brought into Court upon a doubtful title ought to be discharged, with costs.⁴ So a purchaser is not compelled to take a doubtful title, although the defect appeared on the abstract, delivered before he filed his bill.⁵ So the Court will not compel specific performance of an agreement, and oblige a defendant to accept a title, which the complainant cannot make out to be *clearly good and free from incumbrances*.⁶ So, upon a bill for specific performance, if the vendor's title to a part of the land is doubtful, the Court cannot compel him to make good that part by a conveyance of land out of the same survey, to which he has an

¹ Cooper v. Denne, 1 Ves. 565; Trent v. Hanning, 10 Ves. 500; Roake v. Kidd, 5 Ves. 647; Price v. Strange, 6 Madd. 159; Hartley v. Pehall, Peake's Cas. 131; Jervoise v. Northumberland, 1 Jac. & W. 569; Marlow v. Smith, 2 P. Wms. 198.

² Kelly v. Bradford, 3 Bibb, 317

³ Roake v. Kidd, 5 Ves. 647.

⁴ Blossie v. Clanmorris, 3 Bligh, 62.

⁵ Stapylton v. Scott, 16 Ves. 272.

⁶ Butler v. O'Hear, 1 Desaus. 382.

(a) The rule appears to be now well established, as stated in the text. Formerly, in compelling a purchaser to take a title, the Court acted merely upon its own opinion. Jervoise v. Northumberland, 1 Jac. & Walk. 569.

Upon a decision of the Court of Exchequer, that a presumption from non-payment of tithes could not bar even a lay impropiator, the Lord Chancellor, though holding the contrary opinion, would not compel a purchaser to take such a title; and dismissed the bill against him for specific performance. Rose v. Calland, 5 Ves. 186. But, it has been held, the question of title or no title being matter of opinion for the Court, that the purchaser is bound by that opinion, and cannot object to take the title on the ground of the difficulty of the question on which it depends. Rushton v. Craven, 12 Price, 599.

Specific performance was decreed against a purchaser under a power of sale in a mortgage, without the mortgagor, though under a covenant to the mortgagee to join in a sale; but without costs, the only authority produced not being in print. Corder v. Morgan, 18 Ves. 344.

undisputed title, but will give a compensation in money.¹ And, in general, the Court will not compel a purchaser to take a title *depending upon matter of fact*, if the fact do not admit of satisfactory proof, or be not well proved.²

3. A purchaser was not compelled to take a title depending on the questions, whether a deed, not delivered, but merely retained by the vendor until payment of the money, could be considered an escrow; as between a judgment creditor and the assignees in bankruptcy of the vendor, whether payment to the assignees would be a performance of the condition, making the deed absolute from the beginning, and any conveyance from the assignees inoperative; if not an escrow, but absolute from the commencement, whether, with reference to the Statute James I., c. 19, s. 9, the judgment would be operative as against the lien of the assignees for the price; and, if not, what would prevent its attaching on the estate.³

4. It being doubtful, on the construction of an inclosure act, whether an allotment for a right of warren was authorized by the act; held, the title to the allotment was not such as a purchaser could be compelled to take.⁴

5. Mortgage with a power of sale. Held, the unsupported solemn declaration, under Stat. 5 & 6 Will. IV., c. 62, of the mortgagee alone, of a default having been made, was not sufficient evidence of that fact, as between vendor and purchaser.⁵

6. But, though a purchaser will not, upon a bill for specific performance, be compelled to accept a doubtful title; yet, acting on a moral certainty, the Court will not permit him to reject a title, upon the ground that there is a *bare possibility* of its proving to be imperfect.⁶ *Mathematical* certainty is not required.⁷ Thus *mere suspicion*, upon opinions in the

¹ Kelly v. Bradford, 3 Bibb, 317.

² Smith v. Death, 5 Madd. 371.

³ Sloper v. Fish, 2 Ves. & B. 145; Colmore v. Tindall, 2 Y. & Jerv. 605.

⁴ Cassamajor v. Strode, 2 Myl. & Kee. 706.

⁵ Hobson v. Bell, 2 Beav. 17.

⁶ Laurens v. Lucas, 6 Rich. Eq. 217.

⁷ Emery v. Grocock 6 Madd. 54.

abstract, &c., will not support an objection by a purchaser.¹ So, where a purchaser of land from the assignees under a voluntary assignment gave bond for the purchase-money, and, on being sued thereon, interposed as a defence that the title was doubtful; held, it was necessary to prove that the title was bad.²

7. Upon the same principle, with regard to *the burden of proof* upon a question of title, it has been held, that, in an action against the purchaser of land, the vendor is not bound to show title. The contract admits, at least *primâ facie*, his title, and the *onus* is on the defendant to show that he has none. So, where a party contracts to buy land, styling the vendor trustee, he admits the vendor's character as trustee, and *primâ facie* his right to convey. If, therefore, the vendor has no right to convey, the *onus* of showing it is on the defendant.³ So, *primâ facie*, he who enters on land, under a contract to purchase, admits the title of the vendor to be good; and, if he fails to comply with the terms of the contract, he, or any one holding under him, cannot, in an action by the vendor to regain possession of the land, put the vendor to proof of his title.⁴ But, on the other hand, the more rigid rule as to the vendor has been adopted, that, where relief is prayed against him in consequence of his being unable to make a title, his answer must not merely assert that he has a good title, but must show his title.⁵ So, in a suit by a vendee to rescind a contract for want of title in the vendor, and calling on him to exhibit his title, the vendor must exhibit the deeds, and other writings, if there be any, by which he derives title; and he must show a *paper* not a *parol* title.⁶

8. Where the purchaser of an interest, sold under a decree in Chancery, thereby acquires information as to a supposed defect in the title to that interest, and improperly avails him-

¹ M'Queen v. Farquhar, 11 Ves. 467.

² Crawford v. Murphy, 22 Penn. 84.

³ Breithaupt v. Thurmond, 3 Rich. 216.

⁴ Pyles v. Reeve, 4 Rich. 555.

⁵ Boyer v. Porter, 1 Tenn. 258.

⁶ Metcalfe v. Dallam, 4 J. J. Marsh. 200.

self of such information, by purchasing the estate of the person, who alone could have taken advantage of the supposed defect; such purchaser will not be allowed the benefit of the general rule as to doubtful titles.¹

9. Objections by a purchaser of allotments under an inclosing act, that the award of the commissioners was not made, were overruled; the act enabling a sale and declaring the conveyance valid before the award; and, even if the commissioners should vary the allotments, the purchaser having full notice of all the circumstances.²

10. The question has often arisen, whether the title which a purchaser is bound to accept must be a *legal* title, and also whether a mere legal title is sufficient, if there are any *equitable* objections to it. Upon these points the authorities are somewhat conflicting. It has been held, in general, that a purchaser is not to be compelled to take an *equitable* estate.³ Thus, where a vendor covenanted that he would make or cause to be made to the vendee a good and sufficient deed, upon payment of the balance of the purchase money; held, the vendee, who had gone into and remained in possession, could not be compelled to accept an equitable title.⁴ So it is held, that a covenant to convey the *title* means the legal estate in fee, free from all valid claims, liens, or incumbrances.⁵ So, where a vendor sold land clear of all incumbrances, and, at the time of action brought for the purchase-money, and until the time of trial, held only an incumbered equitable title, the fee being in a third person; held, he could not recover.⁶ So, if a vendor represents his title to be good, it is the same as saying his title is perfect for the entire tract, unaffected by any gaps in the chain of title, or any flaw or incumbrance whatever.⁷

11. Under a limitation in a marriage settlement to the husband for life, then to the wife for life, then to the heirs

¹ Sheppard v. Doolan, 3 Dru. & W. 1.

⁵ Jones v. Gardner, 10 Johns. 266.

² Kingsley v. Young, 17 Ves. 468;
18 Ves. 207.

⁶ Ragan v. Gaither, 11 Gill & Johns.
472.

³ Abel v. Heathcote, 2 Ves. 100.

⁷ Smith v. Robertson, 23 Ala. 312.

⁴ Jones v. Taylor, 7 Tex. 240.

of the body of the wife and their heirs, the wife took an estate tail. And, although it was recited in the deed, that the husband's father conveyed in consideration of the marriage, and "for settling and establishing the lands, &c., to the uses thereafter expressed," and subsequent uses were added in the deed; the Court would only take notice of the legal estate; and, the husband and wife having levied a fine, and agreed to sell the estate to a purchaser, from whom they had received part of the purchase-money, he could not recover it back, in an action for money had and received.¹ So, where the vendor of newly inclosed lands undertakes to convey them; this is an undertaking to convey the legal estate; and, the vendor having only an equitable interest previous to the assignment by the commissioners, the vendee is entitled to recover his deposit.²

12. While a mere equitable title has been held insufficient, on the other hand it has been decided that, in an action to recover back the deposit on a purchase, upon the vendor's failure to make a good title, the Court will collaterally inquire whether the title be good in equity. For a contract to make a good title means a title good both at law and in equity; and a Court of Law will adjudge a title to be either good or bad, having no middle term for it.³ So A. buys a house at an auction, and deposits part of the purchase money, the remainder to be paid upon the vendor's making a good title. It turns out that the vendor's title is good in law, but bad in equity. Held, that A. is entitled to recover back the deposit in an action at law.⁴ But in a later case, of assumpsit to recover money deposited upon a purchase, upon an allegation that the defendant had failed to make a proper title; it was held that a Court of Law will not consider whether the title is of a doubtful description, such as a Court of Equity would not compel an unwilling purchaser to take; but simply whether the defendant has or has not a legal title to convey.⁵

¹ *Alpass v. Watkins*, 8 T. R. 516.

² *Cane v. Baldwin*, 1 Stark. Ca. 65.

³ *Maberley v. Robins*, 5 Taunt. 625.

⁴ *Maberley v. Robins*, 1 Marsh. 258.

⁵ *Boyman v. Gutch*, 7 Bing. 379.

13. In general, a title by *deed* or *conveyance* is the one most frequent and least liable to objection. But, under peculiar circumstances, a purchaser may object to a title resting on this foundation.

14. A., entitled under his marriage settlement to a life interest in freehold estates, with remainder to the use of trustees for a term of one thousand years, to secure a jointure and portions, and remainder to himself in fee, conveyed part of the lands to B. in fee, in exchange for others. B.'s heir afterwards having contracted for the sale of the land, the purchaser refused to complete the contract, on the ground that A. had no power thus to exchange. The vendor then procured the execution of certain deeds, with a view of bringing the exchange within the settlement, which, however, were grossly inaccurate. Held, the purchaser was not bound specifically to perform the agreement.¹

15. A purchaser is not compellable to accept a title reported good by the deputy remembrancer, in a creditor's suit, where the close in dispute, having a given name, by which it has been long known, is not described by it in the title-deeds, notwithstanding the vendor has been long in possession of the land, as part of the estate conveyed to him by the deeds. Such a title is merely *primâ facie*.²

16. The generality and vagueness of descriptions of copyhold property on the Court-rolls are so well known, that a vendor is not bound to show how the description on the Court-roll is to be applied to the present state of the property, if he prove that the property has actually been enjoyed and passed under that description for upwards of sixty years.³

17. Where a vendee is in possession under a conveyance with general warranty, and the title has not been questioned by any suit prosecuted or threatened; such vendee has no claim to relief in equity against the payment of the purchase money, unless he can show a defect of title, respecting which the vendor was guilty of fraudulent misrepresentation

¹ Cowgill v. Oxmantown, 3 Y. & Coll. 369.

² Eyton v. Dicken, 4 Price, 303.

³ Long v. Collier, 4 Russ. 267.

or concealment, and which the vendee had at the time no means of discovering.¹

18. The vendee is not bound to accept a title, depending on a conveyance to a creditor, where there is evidence to raise a suspicion that the object of the conveyance was to elude other creditors who were pressing for judgments.² So, where the vendor claims the estate by purchase from his son, the purchaser is entitled to evidence of the fairness of the transaction.³

19. A purchaser is not bound to accept a title depending upon a *recovery*, suffered by a tenant in tail, of lands, the reversion of which had vested in the Crown by attainder of the reversioner.⁴

20. In one case the Court hesitated upon giving sanction to a title, founded on the *destruction of contingent remainders* by a tenant for life; there being no trustees to support them.⁵ But, in a later case, specific performance was decreed, although the vendor's title was founded on the destruction of contingent remainders.⁶

21. Title by *will* or *devise* is hardly less common or important than that by deed; and, in conformity with the general principle above stated, it is held that a purchaser is not compelled to take a title, depending upon the words of a will, which are too doubtful ever to be settled without litigation.⁷ Thus, a testator devised all his manors, messuages, lands, tenements, tithes, and hereditaments, and all his real estate whatsoever, "except what is hereinafter mentioned and devised," to the use of all his children successively in strict settlement; and gave two of them annuities, which he charged upon a rectory held by him under a lease for lives, which lease he directed to be renewed, if those two children, or either, should be living at his death; and that their lives or that of the survivor should be inserted in the

¹ Beale v. Seiveley, 8 Leigh, 658.

² Gans v. Renshaw, 2 Barr, 34.

³ Boswell v. Mendham, 6 Madd. 373.

⁴ Blossie v. Clanmorris, 3 Bligh, 62.

⁵ Roake v. Kidd, 5 Ves. 647.

⁶ Hasker v. Sutton, 2 Sim. & Stu. 513.

⁷ Sharp v. Adcock, 4 Russ. 374.

new lease, and the fine paid out of his personal estate. He gave part of his personal estate specifically; and directed the residue to be laid out in land, to be settled to the same uses as his real estate; but afterwards, by a testamentary paper, unattested, disposed of his personal estate otherwise. The heir contracts to sell the lease of the rectory; and, upon a case directed to the Court of King's Bench, on his bill for specific performance, the certificate was that the lease did not pass by the will, but devolved on the heir as special occupant; but the Lord Chancellor considered that title too doubtful to be forced on a purchaser. An Act of Parliament was therefore obtained.¹

22. Where a party was authorized by a power created since 1838, to appoint by deed or deeds, writing or writings, under hand and seal, attested by two witnesses, and made a will, devising and bequeathing the property, dated subsequently to the Statute 7 Will. IV., and 1 Viet. c. 26, and executed conformably with that act; a purchase, depending for its title upon the question whether it was valid, was held not to be so free from doubt, as that a purchaser was bound to take, and would be compelled, in a suit for specific performance, to accept it.²

23. A testator devised to his wife, in fee, all his real estates of which he might die possessed. Subsequently he purchased an advowson, and by a codicil ratified and confirmed his will. Previously to the discovery of the codicil, the wife contracted to sell the advowson, but, an objection having been taken to her title, the codicil was found and produced, and a statutory declaration made by the attesting witnesses, as to its due execution and validity. The purchaser, however, refused to complete, on the ground that the codicil did not pass the advowson, and also requiring it to be proved in the Ecclesiastical Court. Held, that the codicil did sufficiently refer to the will, but that the evidence of its

¹ *Sheffield v. Mulgrave*, 2 Ves. 526.

² *Collard v. Sampson*, 21 Eng. L. & Eq. 352.

validity was insufficient; that the purchaser could not be compelled to take the title, without the proof necessary to establish a will against the heir; and that the codicil ought to be proved in the Ecclesiastical Court.¹

24. Held, also, the title not being completed before the hearing, the purchaser was not liable to pay interest; but, the suit having been rendered necessary by his disputing the effect of the codicil, even if proved, as a republication, he was not allowed costs.²

25. Devise of copyhold estates, the legal estate being outstanding, "to my son, R. W. G., to be entailed upon his male heirs, and failing such, to pass to his next brother, and so on from brother to brother, allowing £2,500 to be raised upon the estates for female children each." The point whether this was a trust executed or executory; and, if the latter, whether an estate tail in R. W. G.; was held too doubtful to compel a purchaser to take the title.³

26. A purchaser was decreed to take a title under an obscure will, amounting to a power to sell. In such case, the legal estate, not being given, descends to the heir till execution of the power; and then passes to the vendee.⁴

27. Where an estate is decreed to be sold for payment of debts, and no surplus remains, the heir or devisee need not covenant any further than his own acts. But, where the surplus is considerable, the heir must covenant that neither he nor his immediate ancestor, and a devisee, that neither he nor his devisor, have done any act to incumber.⁵

28. Exception to a report in favor of a title derived from *an heir*, on the ground that the reversion in fee might have been disposed of, so as not to have descended. Exception overruled.⁶

29. A conveyance in 1793, from persons residing in Bermuda, of lands then in their possession, and to which, subject

¹ Weddall v. Nixon, 21 Eng. L. & Eq. 9.

² Ibid.

³ Jervoise v. Northumberland, 1 Jac. & W. 569.

⁴ Warneford v. Thompson, 3 Ves. 513.

⁵ Loyd v. Griffith, 3 Atk. 267.

⁶ Sperling v. Trevor, 7 Ves. 497.

to an outstanding, but satisfied mortgage term, they claimed title under an entail created in 1732, through a descent recited in the deeds; a subsequent assignment of the mortgage term from the mortgagee to the purchaser, and uninterrupted enjoyment under his conveyance; will not enable him to make a good title, if unsupported by extrinsic evidence of the pedigree recited in the deeds, or of possession prior to 1793, conformable to that pedigree.¹

30. Upon the death of one of two partners, intestate, his *personal representatives* agreed to sell his moiety of the real property of the partnership to the other, and to furnish him at their own expense with an abstract of their title. Held, they were bound to furnish the usual abstract of titles, and not merely their letters of administration in relation to the personal estate.²

31. A testator gave his real and personal estate to A. subject to the payment of his debts and certain annuities, and appointed him executor. Held, that A. could make a good title to the real estate, without the concurrence of the annuitants, and that a purchaser from A. was not bound to see to the application of the purchase-money; also, that the objection was one of *title* and not of *conveyance*.³

32. A., having sold the real estate, the purchaser insisting that the annuitants ought to concur, filed a bill against the vendor for specific performance. The vendor's answer admitted the sufficiency of the personal estate to pay the debts; that they had all been paid since the contract, and that the sale had not been made for the specific purpose of satisfying the debts. Held, these circumstances did not vary the rule as to the liability of the purchaser to see to the application of the purchase-money, and he was bound to complete.⁴

33. Questions of title also arise in reference to *leasehold* interests and *rents*. (See Chap. 16.)

34. A., having sold certain leasehold premises to B., as-

¹ Fort v. Clarke, 1 Russ. 601.

³ Page v. Adam, 4 Beav. 269.

² Morris v. Kearsley, 2 Y. & Coll. 139.

⁴ Ibid.

signed them by indenture, containing a proviso that B. should not assign over, until the whole of the purchase-money should have been paid; and B. and C. covenanted for themselves, their executors, administrators, and assigns for the payment of the money. The premises, having been taken in execution for a debt of B., who had not paid the purchase-money, were sold by the sheriff to D., who paid down a deposit, and agreed to complete the purchase on having a good title. Held, the non-payment of the purchase money by B. was a sufficient objection to the title, and D. might recover back his deposit in an action for money had and received.¹

35. Declaration, for not completing the purchase of a term of years, of which the plaintiff was lessee. Plea, that the plaintiff did not adduce a good title. The plaintiff's lease contained a covenant, to insure and keep insured the premises during the term, with a proviso of forfeiture and reëntry by the lessor for breach of covenant. The plaintiff had insured, but had not paid the last premium previous to his agreement with the defendant, until a month after it was due. Held, the plaintiff had incurred a forfeiture, which the lessor could still enforce, notwithstanding the subsequent payment and acceptance by the insurance office of the premium; and the defendant had therefore a good defence.²

36. Premises sold at auction were described in the particulars as being customary leaseholds, renewable every twenty-one years, at the customary rent of 10s., on payment of the customary fine. The fourth condition of sale, after fixing a time for the delivery of the abstract and objections to the title, stipulated, that, if there were any objection, which the vendor should be unable or unwilling to remove, he might vacate the sale on repayment of the deposit-money, without interest or costs. The fifth condition stipulated, that the production of the lease by the vendor should be

¹ *Elliot v. Edwards*, 3 Bos. & Pull. 181.

² *Wilson v. Wilson*, 25 Eng. L. & Eq. 392.

accepted as sufficient evidence of the lessor's title. The sixth condition stipulated that errors of description, or any errors inserted in the particulars, should not vacate the sale, but should be the subject of abatement or compensation. It turned out on the investigation of the title, what was previously unknown to all the parties interested, that there was no custom to renew, but that the premises were held for an absolute term of twenty-one years. Held, the fact of the property being sold as leaseholds renewable by custom, when there was no such custom, was an error of description, not a defect of title.¹

37. Also, that the purchaser was, under the sixth condition, entitled to specific performance, with a deduction from the price.²

38. Declaration, that the defendant caused to be put up to sale by auction certain premises, for the residue of a term of years, on the condition, among others, that the defendant should deduce and make a good title thereto, commencing with the lease under which they were then held. Breach, that the defendant did not deduce a good title commencing with the lease. Plea, that the premises were premises of which the defendant was possessed under a mortgage from the plaintiff, for the residue of the term, and were put up to sale under a power of sale in the mortgage; that, before and at the time of the mortgage, the plaintiff held the premises under a lease from A., subject to a covenant by the plaintiff for repair, and a proviso for reëntry, or the cesser of the term, at the option of A. on breach of such covenant; that the plaintiff, before and at the time of the sale, had full knowledge of all the premises; that the defendant did deduce a good title, commencing with the lease, in all respects except this, that the premises were out of repair, of which the plaintiff had full knowledge; that they were at the time of the sale in as good repair as at the time of the mortgage; and that A. had not reëntered or claimed to reënter,

¹ *Newby v. Paynter*, 19 Eng. L. & Eq. 68.

² *Ibid.*

or in any way avoided the lease. Held bad, on general demurrer.¹

39. A railway company served a land-owner with a notice to treat for the purchase of a portion of his land. The land-owner, in the particulars of his claim, stated that he was seized in fee-simple, subject to an unexpired term, and a reserved rent, and that he claimed £1,500 for his interest; which the company agreed to pay. An abstract of title was then delivered to the solicitor of the company, who was also informed that the rent was payable in respect of other land belonging to the plaintiff as well as of that required by the company, and that it must be apportioned. The company claimed the whole rent, and refused to complete their contract on any other terms. On a bill filed by the land-owner against the company, the Court decreed specific performance.²

40. If there be a covenant for title, clear of incumbrances, where there are unextinguished ground-rents, it is error to instruct the jury that the defect may be compensated by a deduction from the purchase-money.³

41. Title sometimes depends upon, or is impaired by *legal process*; more especially *judgments*, as constituting a lien upon land sold.

42. In 1846, the plaintiff, a mortgagee with power of sale, under a mortgage dated in January, 1844, contracted to sell the premises to the defendant. At the date of the contract, the premises were subject to two judgments, registered against the mortgagor in 1843; but it appeared that, on taking his mortgage, the plaintiff also took an assignment to a trustee for himself of the residue of a term of one thousand years, created in 1818; and it was denied by the plaintiff that at the date of the mortgage he had notice of the judgments. The defendant, who had been let into possession, having refused to pay the purchase-money, the suit

¹ Barnett v. Wheeler, 7 M. & W. 364.

² Inge v. Birmingham, &c. 23 Eng. L. & Eq. 601.

³ Gans v. Renshaw, 2 Barr, 34.

was instituted for specific performance. Shortly afterwards, the five years from the date of the registration of the judgments terminated, without a registration of such judgments having been made, pursuant to Statute 2 Vict. c. 11, § 4; and afterwards, pending the suit, one only of such judgments was re-registered. Held, the purchaser could not be forced to take a conveyance, except upon the terms, either of the concurrence therein of the judgment creditor who had re-registered, and of the other in case he should re-register, or of a release or exoneration of the premises from the judgments.¹

43. Conveyance by a debtor to trustees, his creditors, in trust to sell and pay themselves, and the surplus proceeds to the debtor; and to convey to him the lands remaining unsold; the receipt of the trustees to be a sufficient discharge to a purchaser; with covenants for repayment of the money by a certain day, for good title and quiet enjoyment. On a sale under a decree to execute the trusts; held, that judgments confessed by the debtor subsequent to the deed, and still outstanding, were not objections to the title.²

44. An outstanding docketed judgment, not registered pursuant to the provisions of the Statutes 1 and 2 Vict. c. 110, s. 19, and 2 and 3 Vict. c. 11, ss. 2 and 3, is not a valid objection to the title of a vendor on the sale of realty.³

45. On reference of title, in a suit by a vendor for specific performance, a subsequent suit still pending for part of the lands, claimed adversely to the vendor, is not sufficient ground for reporting against the title.⁴

46. An act of *bankruptcy* is a sufficient objection to title without showing a debt, upon which a commission could issue.⁵

47. So an act of bankruptcy and a docket struck, though no commission issued, are a sufficient objection to a bill for specific performance of a previous contract for the sale of

¹ Freer v. Hesse, 21 Eng. L. & Eq. 82.

² Alexander v. Crosbie, 6 Ir. Eq. Rep. 513.

³ Bedford v. Forbes, 1 Carr. & K. 33.

⁴ Osbaldeston v. Askew, 1 Russ. 160.

⁵ Lowes v. Lush, 14 Ves. 547.

an estate to the plaintiff; in a case even where part of the money had been paid, and sub-contracts for sale of part entered into by the plaintiff; and the defendants had agreed to convey accordingly.¹ (a)

48. A devisee, subject to debts and legacies, contracted to sell in order to raise money to pay the debts. Afterwards a bill was filed against her, by the legatees for the administration of the testator's estates, and the purchaser consented to go before the master upon a reference as to title in that suit. Held, he was not thereby bound to take an equitable title, but might insist on having the same title, as he might have required if a suit had been instituted against him for specific performance. And, as two commissions of bankrupt had issued against the devisee, before the contract was entered into, though neither of them was proceeded in, he was not bound to accept the title.²

49. Lands were settled on A. for life, remainder to his wife for life, remainder to their children, with a power of revocation and appointment to new uses by the husband and wife jointly; but if A. should become bankrupt, &c., the limitation to him for life should cease, and the lands should go to trustees during his life, for the benefit of his wife and children. A. agreed for the sale of this estate, and proposed to make title to the purchaser by executing this power of revocation. The conveyance on the part of the purchaser required an indemnity against A.'s having committed any secret acts of bankruptcy, for that the power of revocation would be extinguished by the forfeiture of the life interest of A. On a bill filed by A. to compel performance, held, there was no ground for the objection, and the

¹ *Franklin v. Brownlow*, 14 Ves. 550.

² *Cann v. Cann*, 1 Sim. & Stu. 284.

(a) Upon an exchange of land, it is no objection to a specific execution, that one of the parties has become insolvent, if the Court decree a conveyance from the insolvent, with the warranty of a solvent person as security. *Tyree v. Williams*, 3 Bibb, 366.

mistaken opinion of the conveyancer could not save the defendant from costs.¹

50. In some cases, a legal title may be *presumed*; and, in matters of presumption, the Court will bind a purchaser, where it would give a clear direction to a jury.² Thus a reconveyance of the legal estate was presumed under obscure circumstances, after a great lapse of time, though the possession was originally not adverse, but under a trust; and upon this presumption specific performance was decreed against a purchaser.³

51. A term was created in 1711 for raising portions. There was no evidence of the portions being satisfied; but a settlement of the estate took place in 1744, and a recovery was suffered; and there was a covenant that the estate was free from incumbrances. No assignment appeared to have been made at any time of the term. On an objection to the title by a purchaser, held, that a surrender of the term must be presumed.⁴

52. It was held to be no objection to a title, that two fee farm rents, created by letters-patent by James I., were not shown to have been extinguished, it being proved that no claim had been made by the Crown of the rents from the year 1706, and there being no proof of any previous claim.⁵

53. But it has been held, that a purchaser is not compellable to accept a title to premises, formerly subject to an incumbrance, the discharge of which is shown only by presumption. Thus a leasehold was sold, subject to a ground-rent, which was said to be apportioned out of a larger rent; but the apportionment was not evidenced by any existing deed, but only by the acceptance of a mesne landlord, and presumption. Held, that the purchaser was not bound to accept the title.⁶

54. A title may be gained by *lapse of time* or *limitation*, as well as by direct transfer or alienation. Thus it has been

¹ Maling v. Hill, 1 Cox, 186.

² Emery v. Grocock, 6 Madd. 54.

³ Hiliary v. Waller, 12 Ves. 239.

⁴ Emery v. Grocock, 6 Madd. 54.

⁵ Simpson v. Gutteridge, 1 Madd. 609.

⁶ Barnwall v. Harris, 1 Taunt. 430.

held, that sixty years' possession is an unobjectionable title to a fee-simple.¹ So the Court will compel a purchaser to take a title, depending upon parol evidence of adverse possession under the Statute of Limitations, 3 & 4 Will. IV. c. 27.²

55. King Charles II., being seized in fee of the lands of A., granted them by letters-patent to B. and the heirs male of his body, reserving a yearly rent, equal in amount to the quit-rent which would be payable, if they had been granted in fee. The reserved rent was thereupon put in charge in the Crown rentals, as if it were a quit-rent, and so continued. Subsequently, in 1776, the estate tail determined, by failure of the issue male of B., and ever afterwards the person deriving under the patentee continued in possession, claiming in fee simple, and paying the rent reserved in the letters-patent, as quit-rent. The lands having been decreed to be sold; held, upon exception to a report of good title, that the title of the Crown was barred and transferred to the vendor by the operation of the 48 Geo. III. c. 47, and the exception was overruled.³

56. Upon the same principle, it was held that a deed, under which lands had been claimed forty years, purporting to be executed before the Mayor of Georgetown, though without covenants, seal of the Mayor, or certificate that he was Mayor, could not be objected to by the vendee as a defect in the title.⁴

57. A title may be questionable, as derived from a *married woman* or an *infant*. Thus an estate was settled to the husband and wife successively for life, with remainder to their children, as they should appoint, and, in default of appointment, between such children. The husband and wife incumbered their life interests, and, having seven children, appointed the whole estate to the eldest daughter. Soon after, the husband, wife, and daughter mortgaged the prop-

¹ Barnwall v. Harris, 1 Taunt. 430.

² Scott v. Nixon, 3 Dru. & Warr. 388.

³ Tuthill v. Rogers, 1 Jo. & Lat. 36.

⁴ Brown v. Witter, 10 Ohio, 142.

erty with power of sale. The mortgagee sold to the plaintiff; and, after the title had been approved, one of the younger children gave notice to the plaintiff not to complete, and that the appointment was a fraud on the marriage settlement; and also cautioning the purchaser not to pay the purchase-money. Held, no objection to the title, and that the purchaser must complete the sale.¹

58. Devise to A. for life, remainder to B. for life, remainder to his sons successively in tail male. A. and B., during the infancy of B.'s eldest son, obtained an Act of Parliament, vesting the estates in trustees, in trust to sell. Held, that A. and B. must covenant with the purchaser for the title.²

59. It is no objection to a sale in Court in execution of a will, that there are infants interested under the will, who cannot join in the conveyance.³

60. Two persons, one an infant, being joint claimants of a lot, the elder sells it, and covenants to deliver the deed of both, upon payment of the purchase-money. The whole price falls due, payment is enforced, and the deed made and tendered before the infant attains to majority. Held, the vendee cannot object to the deed, on account of the infancy.⁴

61. A vendor dying intestate, and leaving an infant heir, the purchase-money, being paid into Court in a suit for a specific performance instituted after his death, will be retained till the heir attains twenty-one and conveys.⁵

62. Conditions of sale, after stating that the estate was by settlement limited to Mrs. C. for life, with remainder to trustees in trust to sell for the benefit of her children, proceeded as follows: "And there being three such children only, all of whom have attained the age of twenty-one, such children or their trustees shall, if required, join in the conveyance to the purchaser; but no objection to the title of the vendors shall be made on account of the sale taking

¹ *Green v. Pulsford*, 2 Beav. 70.

² *London Bridge, &c.* 13 Sim. 176.

³ *Powell v. Powell*, 6 Madd. 53.

⁴ *Beckwith v. Marryman*, 2 Dana, 371.

⁵ *Bullock v. Bullock*, 1 Jac. & W. 603.

place during the life of Mrs. C." Two of the children of Mrs. C. were married women, having children who were minors, and they had settled their portion of the money to arise from the sale of the estate in trust for themselves for life, with remainder to their children. Held, that neither the children of Mrs. C. nor the trustees had legal capacity to join in a conveyance, and, therefore, a purchaser was entitled to recover the deposit.¹

63. The following miscellaneous principles and cases may properly be stated, in connection with the subject of this chapter.

64. A reservation of salt-works, mines, &c., in 1704, with a right of entry, though there was no instance of any claim, and the title had been transferred in 1761, without such reservation upon the usual covenants, was held an objection to the title, giving a right to compensation, the purchaser not insisting upon it further; the Court being of opinion that the inference of abandonment of a right from non-user is not applicable to the case of mines.²

65. Commissioners under an inclosure act were empowered to allot common lands among the proprietors of common lands in the parish, and to assign any messuages, buildings, new allotments and old inclosures, in exchange for others; so that such exchange should be ascertained in the commissioners' award or in some deed executed by them, and be made with the consent in writing of the respective proprietors. An appeal was provided to the quarter sessions in six months after cause of complaint. The commissioners, among other things, awarded to A., in respect of an estate of his in the parish, rented by B. and C., *furze close* of five acres, and *hill close* of four acres, late A.'s land; and to D., a proprietor of meadow and arable land in the parish, in respect of his freehold estate, two acres of arable called *Shortlands*, late a common field, and sixteen acres of old inclosure called *Stearts*, late A.'s; without saying that the

¹ Moseley v. Hide, 6 Eng. L. & Eq. 247.

² Seaman v. Vawdrey, 16 Ves. 390.

several closes had been given in exchange for each other, but concluding the award with an approbation of the exchanges made between A. and D. There was no consent in writing by A. or D. Held, in 1813, D. could make no title to *Stearts* or *Shortland*, the lands awarded him, though they had been in his possession ever since the execution of the award in 1798.¹

66. Trustees were empowered by Act of Parliament to sell and exchange all or any of the hereditaments mentioned in the schedule to the act, amongst which was a farm, called the Mountain Farm, parcel of the manor of W. In the body of the act there was a proviso, that the manor of W. should not be sold. The trustees having contracted to sell the Mountain Farm; held, the purchaser was not bound to accept the title.²

67. It is a sufficient objection to a title, that a person under whom the vendors claim held, during his seizin of the estate, a newly-created office under the Crown, (that of Commissioner of Dutch Property,) in which he was directed by statute to pay the surplus (after certain charges answered) of the proceeds of certain sales into the Bank of England, there to remain subject to such orders as the king in council should give thereon, and that his accounts with the Crown were not yet liquidated; the lands being liable to an extent under the Stat. 13 Eliz. c. 4, and at common law also.³

68. By conditions of sale it was stipulated, that the vendor of an estate, sold in lots, should deliver an abstract of the title to the purchasers, and deduce a good title; but, as to a part of the estate, acquired under an inclosure, should not be bound to show any title prior to the award; that he should deliver up to the largest purchaser in value all the title deeds and other documents in his custody, but should not be required to produce any original deed or other docu-

¹ *Cox v. King*, 3 Bing. N. C. 795.

³ *Wilde v. Fort*, 4 Taunt. 334.

² *Lincoln v. Arcedeckne*, 1 Coll. 98.

ments than those in his possession and set forth in the abstract. Held, the conditions did not relieve the vendor from verifying the title shown upon the abstract, by producing the title deeds themselves, or, if any of them were not in his possession, by other satisfactory evidence. A vendor, to exonerate himself from the production of any evidence necessary to verify the title beyond what the title-deeds in his own custody will supply, is bound so to inform the purchaser in clear and explicit terms.¹

69. The question of *time*, as an essential element of the contract, has already been fully considered. (Chap. 11.) It may be added in this connection, that the Court will not annul a sale for want of title, without giving the vendor a reasonable opportunity in point of time, to make an imperfect title sufficient. Thus, if the vendor be willing, ready, and able to make title at the time when he has contracted so to do, it is immaterial that he had no title at the date of his contract, especially where the vendee, at both periods, has notice of the facts of the case.² So, where a vendor, who has covenanted to make a good title upon payment of the balance of the purchase-money, sues for such balance, and, being called upon to make good his covenant, presents a title which is defective in some particulars; if the vendee has not been compromitted to the acceptance of such title, the Court should allow to the vendor a certain time within which to perfect the title, the collection of the money to be suspended in the mean time; and, if it should be out of his power to perfect the title, then the vendee should be required to accept the vendor's deed with warranty, or to restore the premises, and equitably account for the rents and profits.³ So, if one agrees to sell an estate, and it is afterwards discovered that a small portion of it is the property of another person, the Court will not discharge the purchaser

¹ Southby v. Hutt, 2 Myl. & C. 207.

² Tison v. Smith, 8 Tex. 147; acc. Webb v. Austin, 7 M. & G. 701; Stow-

ell v. Robinson, 5 Scott, 196. See

Shaw v. Rowley, 16 M. & W. 810.

³ Jones v. Taylor, 7 Tex. 240.

from his contract, without giving the seller an opportunity of acquiring a title to that portion.¹

70. A person contracted to sell an estate, who had no legal or equitable title to it, by reason of the alienage of a party through whom he claimed. The purchaser, by his own inquiries, ascertained the defect of title, but did not, till after some months of negotiation with the vendor, repudiate the contract. The vendor then filed his bill for specific performance, and, pending the investigation of the title in the Master's office, obtained a grant of the estate from the Crown. Held, that he was entitled to a decree.²

71. Sale by auction on the following conditions: the purchaser to pay a deposit of ten per cent., and sign an agreement for the payment of the balance of the price on or before November 28th; a proper abstract to be delivered within fourteen days from the sale, and a good title deduced at the vendor's expense, having regard to the conditions, but not fixing any time; the conveyance to be prepared by and at the cost of the purchaser, and left with the vendor's solicitors for execution on or before November 10th; all objections to the title to be communicated to the vendor's solicitors within twenty-eight days from delivery of the abstract. The purchaser brings an action against the vendor for the deposit, on the ground that he had not deduced a good title by the 28th of November. Held, on special demurrer, that the declaration was bad, for not alleging that a reasonable time for deducing a good title had elapsed before suit commenced.³

72. A party holding a bond for title to three sixteenths of a tract of land, conditioned that, if certain ore upon the premises should prove to be good silver ore, he was to pay a specified sum, and if not, the sale to be void, sold one sixteenth absolutely, the grantee knowing the terms of the

¹ *Chamberlain v. Lee*, 10 Sim. 444.

³ *Sansom v. Rhodes*, 8 Scott, 544.

² *Eyston v. Symonds*, 1 Y. & Coll. C. C. 608.

grantor's purchase, and the grantor being guilty of no fraud or misrepresentation. Held, the latter sale was valid, and the grantor was entitled to a reasonable time in which to perfect his title.¹

73. Where a title bond binds the obligor to convey a certain quantity of land in one, two, or three surveys, as the obligee may choose, the former is not bound to convey, until the latter has made his selection, and had the land surveyed. And, there being a latent ambiguity in the description of the land sold, which can only be cleared up by an actual survey, it is error to decree a rescission of the contract until a survey has been made, so as to enable the Court to decide whether the obligor can comply with his contract or not.²

74. The same favorable principle in regard to the rights of a vendor has been adopted with reference to the *title-deeds*.

75. Agreement on the sale of an estate, that the title-deeds should be delivered to the purchaser on the completion of the contract; but, as the deeds related also to other property belonging to the vendors, the purchasers should enter into, or procure to be entered into, one or more proper and sufficient covenant or covenants with the vendors for the production and delivery of copies of such deeds. The purchasers were trustees, and entered into the contract in pursuance of the directions in the will of their testator, for the investment of his personal estate in the purchase of lands, to be settled to certain uses creating estates for life, with remainder over in strict settlement. The estate was conveyed by the vendors to the purchasers to the uses declared by the will of their testator. Held, that the agreement, to enter into a proper and sufficient covenant for the production of the deeds, did not mean that the vendors should be entitled to a covenant which would secure to them their production at all times and under all circumstances; that the words *sufficient* and *proper* were to be

¹ Reeves v. Dickey, 10 Gratt. 138.

² Purcell v. McCleary, 10 Gratt. 246.

construed together; that the mode of taking the conveyance must in a great degree determine the meaning and sufficiency of the covenant; that the releasees to uses, like trustees, would ordinarily be required to covenant only for their own acts; and the Court would not require the purchasers, being such releasees, to covenant as demanded, especially after the uses were executed by the statute.¹

¹ *Onslow v. Londesborough*, 17 Eng. L. & Eq. 542.

CHAPTER XXVIII.

INDEPENDENT COVENANTS IN A CONTRACT OF SALE AND PURCHASE.—EXCEPTIONS TO THE RULE OF REQUIRING THE VENDOR TO CONVEY A GOOD TITLE.

1. ALTHOUGH the contract of sale and purchase, as has been stated, is in general mutual and conditional, so that the vendor cannot enforce performance, without fulfilling his own part of the agreement; yet this construction depends upon the circumstances of the case, and the peculiar phraseology used by the parties, and will not be adopted, where, from the language used, they appear to have intended otherwise, or where substantial justice requires a different construction. (a) Several old and leading cases may be cited,

(a) No subject has been more prolific of nice distinctions and conflicting decisions, than that of the dependence or independence of covenants, entered into, respectively, by the parties to a contract. As the cases do not pertain wholly or chiefly to the sale and purchase of real property, it would be foreign from our plan to do more than state the general principles which may now be considered as settled by the weight of authority.

In *Kingston v. Preston*, Dougl. 690, Lord Mansfield says: "There are three kinds of covenants—1st, such as are called *mutual* and *independent*, where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. 2dly. There are covenants which are conditions dependent on each other, in which the performance of one depends on the prior performance of the other, and therefore till this prior condition be performed, the other party is not liable to an action on his covenant. 3dly. There is also a third sort of covenants which are mutual conditions to be performed *at the same time*; and in these, if one party was ready, and offered to perform his part, and the other neglected or refused to perform

to illustrate this exception. Thus, where A. covenants with B. to marry his daughter, and B. covenants to convey an

his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act. The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties, and however transposed they may be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance."

It is further said, by a writer of high authority, "Almost all the old cases, and many of the modern ones on this subject, are decided upon distinctions so nice and technical, that it is very difficult, if not impracticable, to deduce from them any certain rule or principle by which it can be ascertained, what covenants are independent, and what dependent, and of course, when it is necessary to aver performance in the declaration, and when not." 1 Wms. Saun. 320, n. 4. "The Judges in these cases seem to have founded their construction of the independency or dependency of covenants or agreements on artificial and subtle distinctions, without regarding the intent and meaning of the parties. Covenants are construed to be either dependent or independent of each other, according to the intention and meaning of the parties, and the good sense of the case; and technical words should give way to such intention. The following rules are to determine the question: 1. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day *is* to happen, or *may* happen, *before* the thing which is the consideration of the money, or other act, is to be performed; an action may be brought for the money, or for not doing such other act *before* performance, for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent. And so it is where *no time* is fixed for performance of that, which is the consideration of the money or other act. 2. When a day is appointed for the payment of the money, &c., and the day is to happen *after* the thing which is the consideration of the money, &c., is to be performed, no action can be maintained for the money, &c., *before* performance. 3. Where a covenant goes only to *part* of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration. 4. But where the mutual covenants go to the *whole consideration* on both sides, they are mutual conditions and performance must be averred." Ib. 320 a, b, c.

Some further tests of the dependence or independence of covenants have been suggested by Judges and elementary writers; such as, the provision

estate to A. and the daughter, in special tail, it is said, that though A. marry another woman, or the daughter another

that the acts on the one side and the other are to be done *at the same time*; the *nature* of the acts to be performed, and the *order* in which they must necessarily precede or follow each other; the fact that one act is *the consideration* for the other; and the use of the participle, "doing," "performing," &c., which, prefixed to a covenant by another person, is said to be a mutual¹ (independent) covenant, and not a condition precedent. See 1 Chit. Pl. 313-5; 2 Pars. on Contr. 40 and n. It would seem, however, that this is an unnecessary amplification of the different classes of covenants, and involves the subject in needless intricacy, because, as has been already remarked, nearly all these artificial rules are, by the later authorities, made to yield to the intent of the parties and the justice of the case.

The following remarks may be cited, as showing that covenants are to be construed, with reference to the point now under consideration, rather by the apparent intent than by any more technical standard:—

"If a party promise to build a house upon the land of another, and to dig a well on the premises, and to place a pump on it; and the owner of the land covenants seasonably to supply all materials and furnish a pump; it is very clear that the stipulation to furnish materials is dependent, and constitutes a condition, because the builder cannot perform on his part until he has the materials. So to put a pump into the well. But the stipulation to dig a well is not conditional, because it goes to a small part only of the consideration, and does not necessarily depend on a prior performance, on the part of the owner, and because a failure can be compensated in damages, and the remedy of the owner is by action on the contract." Per Shaw, C. J., *Knight v. N. E. Worsted Co.*, 2 Cush. 286.

"When the act of one party must necessarily precede any act of the other, as where one stipulates to manufacture an article from materials to be furnished by the other, and the other stipulates to furnish the materials, the act of furnishing the materials necessarily precedes the act of manufacturing and will constitute a condition precedent, without express words." Per Shaw, C. J., *Milldam, &c. v. Hovey*, 21 Pick. 439.

Upon the same principle, a very late case was decided in Massachusetts. The defendant covenanted with the plaintiffs to proceed to California, as one of a joint-stock company, and labor there for two years, and to remit the plaintiffs one half of the net proceeds of one share in the company, so

¹ This word is ordinarily used in the sense of *conditional* or *dependent*, but sometimes, either designedly or inadvertently, in the directly contrary sense of *unconditional* and *independent*.

man, still A. may have an action against B. on the covenant; but if B. had covenanted to convey the estate *for the cause aforesaid*, the marriage is a condition precedent, and no action will lie until it be solemnized.¹ So, where one covenanted with his copyholder, to assure to him and his

¹ 15 H. 7, 10, pl. 17; Bro. Covenant, 22.

often as dividends should be made. The other members, while on the way to California, contrary to the defendant's wishes, abandoned the enterprise, and sold their vessel and cargo. Held, the defendant was not liable on his covenant to proceed to California. Bigelow, J., says, in substance, "It is necessary to consider the situation of the parties, the subject-matter of the contract, and the purposes and objects to be accomplished by it. The defendant, it is true, agreed with the plaintiffs to go to California and to remain there for two years, and it appears that he failed to comply with this stipulation. If nothing further appeared, the plaintiffs would have shown a breach of the agreement, for which they would be entitled to damages. But it is necessary to bear in mind with whom, how, and for what purpose he was to go there. He was not to go alone, upon his individual responsibility, to trade and labor for the benefit of the plaintiffs and himself. He was to proceed thither as one of a company or copartnership, of which the plaintiffs and others were members. It was a joint enterprise or adventure, in which the capital, industry, and energy of each member, or a substitute to be approved by the company, were to be combined for the mutual benefit and profit of all. The plaintiffs had no right, under this contract, to require the defendant to give his individual time and services to them, disconnected from those who had agreed to render theirs in carrying on the joint enterprise." *Field v. Woodmaney*, 10 Cush. 427, 431, 432.

The course of decisions upon this subject has been exceedingly variable in different Courts, and elaborately decided cases have been often overruled by subsequent ones in the same Court. Thus the cases of *Terry v. Duntze*, 2 H. Bl. 389; *Seers v. Fowler*, 2 Johns. 272; and *Havens v. Bush*, Ib. 387, which were supposed unreasonably to extend the generally correct principle, of construing covenants to be wholly independent where any part of the one is to be performed before execution of the other, were overruled in *Cunningham v. Morrell*, 10 Johns. 203. So the cases of *Craddock v. Aldridge*, 2 Bibb, 15, and *Mason v. Chambers*, 4 Litt. 253, which adopted the same doctrine, were overruled in *MLane v. Rush*, 9 Dana, 64, and *Allen v. Sanders*, 7 B. Mon. 593. So also the decision of the Supreme Court of New York, in *Grant v. Johnson*, 6 Barb. 337, was subsequently reversed, 1 Seld. 247.

heirs the freehold and inheritance of his copyhold, and the copyholder, in consideration of *the same performed*, covenanted to pay a certain sum; held, a condition precedent, and the party must make the assurance before he could claim the money; otherwise, had the words been, in consideration of the said covenant *to be performed*.¹

2. Articles of agreement between A. and B. A. covenants that, for the consideration thereafter expressed, he will convey lands to B. in fee, and B. for the consideration aforesaid covenants to pay a certain sum to A. Held, independent covenants, and that A. might bring an action for the money before any conveyance of the lands.²

3. The plaintiff conveyed to the defendant the equity of redemption of a plantation in the West Indies, with the stock of negroes upon it, in consideration of £500 and an annuity of £160 for life, and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and that B. should quietly enjoy. The defendant covenanted, that, the plaintiff well and truly performing all and everything contained on his part to be performed, he would pay the annuity. In an action on the defendant's covenant, for non-payment of the annuity, the plea was, that the plaintiff was not at the time legally possessed of the negroes, and so had not a good title to convey. The Court of King's Bench, on demurrer, held the plea bad, remarking that, if such plea were allowed, any one negro, not being the property of the plaintiff, would bar the action.³

4. As has been already explained, the *mutuality* of the contract of sale and purchase has been chiefly illustrated, in requiring the vendor to make a *perfect title* to the vendee, involving, of course, not merely the execution of a conveyance, but also the transfer, by means of such conveyance, of an absolute ownership or property in the land. On the other hand, the doctrine, that the covenants of vendor and

¹ Brocas' case, 3 Leon. 219.

³ Boone v. Eyre, 1 H. Bl. 273.

² Rolle's Abr. 415, pl. 8.

vendee are *independent*, has been chiefly applied, in giving the former a claim upon the latter without *any* performance on his own part. But the subordinate question also arises, whether, even where the stipulations are dependent, the special terms of the contract are not satisfied by the mere execution of a conveyance, although insufficient to pass a perfect title; the vendor himself not having such title. Some cases are found in the books which thus restrict the vendor's obligation. Thus it is held, that, under a contract for the sale and purchase of lands, equity will decree *a good and sufficient conveyance* to be made upon payment of the purchase money.¹ And it has been further held, in Massachusetts, in construction of the terms "good and sufficient" that a contract to execute and deliver *a good and sufficient* warranty deed of land is not a contract to convey a good title. Therefore a declaration, alleging as a breach that the defendant had no legal and valid title, is insufficient.² It is said, "the words 'good and sufficient' relate only to the validity of the deed to pass the title, which the defendants had, to the plaintiff, and do not imply that their title was valid, or that it was free from incumbrances. To guard against any defect of title a covenant of warranty was provided for; which shows clearly that the agreement was so understood by the parties. If any authority were necessary to support so plain a construction of the contract, the case of *Gazley v. Price*, 16 Johns. 268, will be found full and decisive as to this point."³

5. So, in the case in New York just referred to, (s. 4,) it is held, that, when the plaintiff covenants to give a *good and sufficient* deed on a certain day, and the defendant covenants on the same day to pay part of the consideration, and secure the residue, the covenant is performed by the plaintiff's delivering a deed, sufficient in law to pass any title which he may have, but without covenant or warranty; and the plain-

¹ *Murphy v. McVicker*, 4 McLean, 252.

³ Per Wilde, J. *Tinney v. Ashley*, 15 Pick. 552.

² *Tinney v. Ashley*, 15 Pick. 546.

tiff, in an action of covenant on the agreement to recover the consideration, having averred that he had given a deed, a plea that the plaintiff was not seized, and had not power to sell, is bad.¹

6. Other cases have occurred in the same State, to the same effect.

7. Agreement, to "execute a deed to (the vendee) his heirs and assigns forever." Held, the vendor was bound only to give a conveyance or assurance of the property, without warranty or personal covenants.² The Court say, "by covenanting to execute a deed, no greater duty or obligation can be intended than to execute a conveyance or assurance of the property, which may be good and perfect, without warranty or personal covenants. In the case of *Frost and others v. Raymond*, 2 Caines' Rep. 191, it is stated, in the opinion of the Court, to be a settled position, that an estate in fee may be created by the usual and solemn forms of conveyance, without warranty, express or implied; and that a conveyance in fee does not, *ipso facto*, imply a warranty; that if it did, our books would be inconsistent and unintelligible on the subject. The case of *Nixon v. Hyserott*, 5 Johns. 58, supports the same principle, and shows that a general power to execute a deed does not authorize the giving it with the usual covenants of warranty, &c. It is evident, then, that where it is contracted to execute a deed, as in this case, to the plaintiff, his heirs and assigns, forever, no covenant of any description can be intended, either by implication or otherwise; nor will the circumstance of the sale being at auction vary the result."³

8. So an agreement to give a deed of land was held to be satisfied by a quit-claim deed without covenants.⁴ "Courts of Law can exact no more of parties than the performance of their contracts, according to the intention manifested by

¹ *Gazley v. Price*, 16 Johns. 267.

³ *Per Yates, J.* 12 Johns. 442-3.

² *Van Eps v. Schenectady*, 12 Johns. 436. A case said to be "very well considered." 16 Johns. 269.

⁴ *Ketchum v. Evertson*, 13 Johns. 359.

the terms used by them. When, therefore, it is agreed that a deed shall be given, nothing more can be exacted than an instrument sufficient to pass the estate of the party who is to give a deed. If it be required that the deed should contain covenants of warranty, nothing is more simple than the insertion of that stipulation. A deed does not, *ex vi termini*, mean a deed with covenants of warranty, but only an instrument with apt terms conveying the property sold."¹

9. So the words "a good warranty deed of conveyance," were held to relate to the *instrument* of conveyance, not to the *title*.² (a)

¹ Per Spencer, J.; 13 Johns. 364.

² Parker v. Parmele, 28 Johns. 130.

(a) With reference to the cases in New York, referred to in the text, it is to be remarked, that they do not conform to the current of decisions in other Courts, and can hardly be considered to express the existing rule of law in that State. Thus, in the case of *Ketchum v. Evertson*, (p. 45,) it was remarked, in connection with the point, that under the form of sale there proved no *release of dower* was necessary; "had the agreement been, that the defendant should, by deed, vest the title to the lands sold, in the plaintiffs, then the plaintiffs would have had a right, if the entire legal title was in the defendant, so that the wife might have been endowed of the land in case of her survivorship, to insist on her joining in the deed." So in *Gazley v. Price*, (p. 45,) the Court comment with approbation upon the prior case of *Jones v. Gardner*, 10 Johns. 266, which was as follows: Covenant to give a good and sufficient deed in law to vest the purchaser with the title of the farm of land, with the appurtenances. The vendor's wife did not duly execute the deed. Held, the deed was not a fulfilment of the contract, because the agreement bound the vendor to give a deed which should pass the legal estate in fee, free and clear of all valid claims, liens, and incumbrances. (*Acc. Thrasher v. Pinckard*, 23 Ala. 616; *Stevens v. Hunt*, 15 Barb. 17.) So a very recent case decides, that a covenant to sell and convey land by warranty deed is not answered by the delivery of a deed with the usual covenant of warranty, so as to pass whatever estate the grantor has in the lands, but should also be an operative conveyance, and pass to the grantee a perfect title. *Atkins v. Bahrett*, 19 Barb. 639.

And the former decisions may perhaps be regarded as virtually overruled by the case of *Fletcher v. Button*, 4 Comst. 396, 6 Barb. 646, where a contract to give a good and sufficient deed of land, free from all incumbrances,

was held not to be satisfied by a warranty deed, the grantor not having the legal title. Ruggles, J., says: "I think the defendant is mistaken in assuming that a deed which conveyed no title would have been a performance of his contract. There are, however, two cases which give countenance to the defendant's construction of the bond in this respect. The one is *Gazley v. Price*, (16 Johns. 267,) the other is that of *Parker v. Parmelee*, (20 Johns. 130.) But the reasoning in that case falls short of showing that a covenant to execute a *good and sufficient deed of conveyance* is satisfied by a deed which *conveys* nothing. It is difficult to reconcile these cases with *Clute v. Robinson*, 2 Johns. 213, and *Judson v. Wass*, 11 Id. 525, and *Van Eps v. Schenectady*, 12 Id. 436. In the first-mentioned case, Chief Justice Kent says: "A covenant to execute a good and sufficient deed of a piece of land, does not mean merely a conveyance good in point of form. That would be a covenant without substance. But it means an operative conveyance, one that carries with it a good and sufficient title to the lands." In *Judson v. Wass*, the plaintiff agreed to execute and acknowledge a deed to the purchaser with warranty of title except as to the quit-rents on certain lots. This was held to mean not merely that he would execute a deed containing such a covenant, but that he had the power to give a deed which would convey with it an indefeasible title to the lots subject to no other incumbrance or charge than that specified in the agreement. The learned Judge proceeds to remark that the case of *Van Eps v. Schenectady*, (p. 45,) although deciding that a deed without covenants was a compliance with the conditions of sale in that case, yet also decided that, in order to be so, such deed must actually convey the land; and as the deed in question did not thus convey it, the purchase-money should be recovered back. So in *Atkins v. Barrett*, 19 Barb. 639, *Brown, J.*, says: "In *Carpenter v. Bailey*, (17 Wend. 244,) the cases of *Gazley v. Price* and *Parker v. Parmelee* were in effect overruled. In *Pomeroy v. Drury*, (14 Barb. 418,) the late Mr. Justice Barculo declares it 'safe to say that (these cases) are no longer authorities for holding that a covenant to convey lands by warranty deed or on sale, refers only to the form and sufficiency of the deed, and not to the title conveyed.'" After an elaborate and careful examination of the authorities, he arrives at the conclusion, that "when a man buys a piece of land and contracts for a conveyance, in general terms the presumption is that he expects the title, and the grantor should be required to give him a perfect title."

The following terms in the contract of a vendor have been held to require the conveyance of a good title:—

* Covenant to execute a good and valid deed of land, with the usual covenants. *Stone v. Stevens*, 7 Verm. 27; *Lawrence v. Dole*, 11, 549.

Covenant to give a "good and perfect deed." *Greenwood v. Ligon*, 10 Sm. & M. 615; *Feemster v. May*, 13, 275.

To give a "warranty deed, free and clear of all incumbrances." *Porter v. Noyes*, 2 Greenl. 22.

To "sell and convey, the title to be a good and sufficient deed." *Brown v. Gannon*, 14 Maine, 276.

To "execute a proper deed, conveying the fee-simple, with full covenants." *Traver v. Halsted*, 23 Wend. 66.

To "grant, convey, and assure, by a good and sufficient deed, to be made and executed according to law, with proper covenants of seizin, right to convey, against incumbrances and of warranty." *Little v. Paddleford*, 13 N. H. 167.

To convey "by a good and sufficient warranty deed, in fee-simple, free and clear of all incumbrances." *Everson v. Kirtland*, 4 Paige, 628.

To "make a lawful title." *Clark v. Redman*, 1 Blackf. 380.

To "give a good and sufficient deed, with covenant of warranty." *Tindall v. Conover*, 1 Spenc. 214.

In *Hill v. Hobart*, 16 Maine, 164, *Shepley, J.*, says: "Without asserting that they (the decisions) can all be perfectly reconciled, it is believed, that the general principle to be collected from them is, that when the contract stipulates for a conveyance of the land or estate, or for the title to it, performance can be made only by the conveyance of a good title. And when it stipulates only for a deed, or for a conveyance by a deed described, performance is made by giving such a deed or conveyance as the contract describes, however defective the title may be."

The following recent cases may be cited, as illustrating the general subject of this chapter:—

In an action of covenant in the nature of a bill for specific performance, on an agreement to convey land in fee-simple free from incumbrances, it was held to be sufficient for the vendor to prove, that he had paid a judgment which was a lien, though satisfaction was not entered on the docket, and tendered a deed in fee-simple with special warranty; and that it was not necessary for him to tender the whole chain of title. *Espy v. Anderson*, 14 Penn. 308.

Plaintiff sold to the defendant a tract of land for \$7,969, payable in several instalments. When \$2,000 were paid, he was to convey certain parts of it. Plaintiff also agreed, that he would see that "Stanley street was continued and opened to the defendant's north line;" and that, when the contract had expired, and the payments were all made, he would convey the premises. In an action, brought before all the payments were due, held, the plaintiff was not obliged to continue and open Stanley street until all the payments were made; that the defendant was not entitled to *recoupement* for damages occasioned by non-fulfilment by the plaintiff of his engagements, and that from the contract and circumstances, it was not the intention

of the parties, that Stanley street was to be opened in a reasonable time. *Farmers, &c. v. Hunt*, 16 Barb. 514.

A. contracted to execute to B. a quitclaim deed of certain premises, and afterwards gave him a certificate, that at the making of the contract he consented and agreed he should take possession forthwith. Held, B. could not maintain an action against A. for damages, because a third person had intruded upon a portion of the premises, and kept B. out of possession, there being no agreement to put B. in possession. *Tewksbury v. Laffan*, 1 Cal. 129.

CHAPTER XXIX.

PARTICULAR ACTS TO BE DONE BY THE VENDOR, IN ORDER TO ENFORCE THE CONTRACT.—TENDER OF DEED, BY WHOM TO BE MADE.—OFFER OR READINESS TO PERFORM, WHETHER SUFFICIENT.—ALLEGATIONS AND PROOF.

1. HAVING considered the general question, as to the obligation upon a vendor of making a good title, in order to enforce the contract against the vendee ; we proceed to point out the particular allegations and proofs involved in this requisition.

2. One of the most important inquiries upon this subject is, whether the vendor is bound to prepare and tender a deed. As has been already stated, (Chap. 12,) the English law does not impose this duty upon the vendor, but requires the purchaser to prepare the deed and offer it to the vendor for execution. The history and reasons of this rule, which has been generally reversed in the United States, and indeed does not seem to accord with the natural and usual course of dealing in a mutual transaction, are thus stated by Mr. Sugden:—

3. “ A purchaser cannot maintain an action for breach of contract, without having tendered a conveyance, and the purchase-money. It was always clear that the vendor need not tender a conveyance where the purchaser was required to prepare it or to bear the expense of it. But the general proposition was rendered doubtful by some recent *dicta* of the Judges, that it is incumbent on the *vendor* to prepare and tender a conveyance, which, as a general rule, certainly seems to have prevailed when the simplicity of the common law prevailed, and possession was the best evidence of title ;

but upon the introduction of modifications of estates, unknown to the common law, and which brought with them all the difficulties that surround modern titles, it became necessary to make an abstract of the numerous instruments relating to the title, for the purpose of submitting it to the purchaser's counsel; and it then became usual for him to prepare the conveyance. This practice has continued, and is now the settled rule of the profession; the rule is, indeed, sometimes departed from, but this seldom happens, except in the country, and it always arises from consent, or express stipulation. In a late case,¹ this point came distinctly before the Court of Exchequer, and it was, in conformity to the practice of the profession, decided, that the purchaser, and not the vendor, is bound to prepare and tender the conveyance. In the early case of *Webb v. Bettel*,² the same rule was expressly recognized by Windham, J., and denied by no one. He said 'that where a person is to execute a conveyance generally, there the counsel of the purchaser is intended to draw it, and then the purchaser ought to tender it.' It is settled, that if a conveyance is to be prepared at the expense of a purchaser, he is bound to tender it. Now it is admitted on all hands, that the expense of the conveyance must be borne by the purchaser, if there be no express stipulation to the contrary. Therefore, where there is no such stipulation, the purchaser is bound to tender the conveyance. In a late case in the Court of Exchequer, where a lease was to be prepared at the sole expense of the lessor, it was held that he was to prepare it, and not the lessee. It may be, indeed, that one may be bound by the express terms of a contract to prepare a lease or conveyance, and yet that it shall be paid for by another, for such stipulations are not inconsistent; but where all that is stipulated for is, that it shall be prepared at the expense of the lessor, and there is no contract to explain it, it must be intended that the lessor is to prepare it also. Upon the whole, notwith-

¹ *Baxter v. Lewis*, 1 Forr. Exch. 61.

² 1 Lev. 44.

standing the recent *dicta* to the contrary, we may be warranted in saying that the purchaser, and not the vendor, ought to prepare and tender the conveyance. And so the point has been finally decided.¹ But although a purchaser is expressly required to prepare a conveyance, yet if a bad title be produced, he may maintain an action for recovery of his deposit, without tendering a conveyance. So where a vendor has, by selling the estate, incapacitated himself from executing a conveyance to the first purchaser, that renders further expense and trouble on his part unnecessary; and he may accordingly sustain an action without tendering a conveyance or the purchase-money.”²

4. Agreeably to these views, in England, it is incumbent on the vendee to prepare the conveyance, even where the agreement is silent on the subject.³ And, more especially, a stipulation, that the conveyance should be at his own expense, is equivalent to a provision that he should prepare it.⁴

5. But, as stated, (s. 2,) the English rule on this subject has not been for the most part adopted in the United States; for the many sufficient reasons set forth in some of the cases which we proceed to cite; and it may be laid down as the prevailing doctrine of American law, that the *vendor* is bound to prepare and tender the conveyance, more especially where a definite time is fixed by the contract, or where the price or any part of it has been paid or secured. Whether the vendee is bound to demand a deed, before proceeding against the vendor for non-performance of the contract, is a point somewhat unsettled, and depending on the language of the agreement, and the circumstances of the case. But he is not himself bound to prepare and tender the deed.

6. Thus it is held in Massachusetts, that a party, who contracts to execute and deliver a deed, is bound to prepare the deed, if there be no stipulation that it shall be prepared by the grantee.⁵ “If the law of England is otherwise, it

¹ Stephens v. Medina, 3 Gale & Dav. 110.

² 1 Sugd. 308-11.

³ Poole v. Hill, 6 M. & W. 835; Baxter v. Lewis, 1 Forr. 61.

⁴ Seward v. Willock, 5 E. 198.

⁵ Tinney v. Ashley, 15 Pick. 546.

must be founded on custom and practice and not on any legal principle independently of practice.”¹

7. In New York, where it was formerly held that the vendee must make a double demand for a deed, (see Chap. 12,) which somewhat anomalous doctrine has, however, been since overruled, the Court say, “It may be considered the rule of this Court, that when a party covenants to convey, he is not in default until the party who is to receive the conveyance, being entitled thereto, has demanded it, and having waited a reasonable time to have it drawn and executed, has made a second demand. In England, the party entitled to the deed is bound to have it drawn and presented for execution; we have not gone so far; the party who is to give a deed, certainly should have it drawn at his own expense, but upon such a covenant as that declared on in this case, (a covenant to convey by a day certain) the covenantor is not bound to prepare the conveyance until it is demanded, when it is his duty to execute and perfect the conveyance with all reasonable dispatch, and hold it ready for delivery when called for.”²

8. In *Carpenter v. Brown*,³ Gridley, J., says: “There was no necessity for the announcement of such a doctrine (the necessity of a second demand) in that case. The remark was obiter, and we think is not the law of the land.” He proceeds to remark, that, where the time for delivering a deed is not specified in the contract, a reasonable time should perhaps be allowed after a demand. But where the time is fixed, one demand is sufficient, even if any is requisite. And the doctrine, that the vendee must prepare and tender a deed, is still more explicitly disavowed.

9. In Pennsylvania, the English doctrine is also rejected for the reasons thus assigned: “Sugden founds his opinion on the modern practice of conveyances in England, and confesses, that formerly the conveyance was prepared by the

¹ Per Wilde, J., *Ibid.* 552.

³ 6 Barb. 149.

² Per Savage, C. J., *Connelly v. Pierce*, 7 Wend. 131.

seller. The change which has taken place in the practice, he attributes to the difficulties which surround titles of land, since the introduction of the mode of conveying founded on the statute of uses; but even now, it is incumbent on the seller to furnish an abstract of all the title papers, to be submitted to the purchaser's counsel. Sugden confesses, also, that by some *recent dicta of eminent Judges*, it is incumbent on the *seller* to prepare and tender a conveyance. It is evident, however, that what may be a very convenient practice in *England*, may be very inconvenient here. We have not yet introduced, and it is unnecessary that we should introduce, the intricacies and expenses of *English* conveyancing, which have been much increased by the universal practice of marriage settlements. In the present situation of the country, there is no difficulty in preparing a deed of conveyance, and, therefore, no pretence for dispensing with what appears to be the plain meaning of the parties; that is to say, that when the seller covenants, that he will convey the title to the purchaser, (without any mention of such conveyance as the purchaser shall devise, &c.,) he shall himself prepare and tender the deed of conveyance."¹

10. In *Mississippi*, in the case of *Johnston v. Beard*,² the Court say, "in *England*, the party entitled to the deed is bound to have it prepared, and presented for execution. The purchaser is to be at the expense of the conveyance. We need not now determine which of these is the correct rule, (viz: this, or the *New York* rule as to demanding a conveyance,) since one or the other undoubtedly is. If either be adopted this declaration is bad." In the subsequent case of *Standifer v. Davis*,³ the Court distinctly hold, that it is sufficient for the vendee to demand a deed from the vendor, without himself preparing it.

11. But, in *Arkansas*, the Court have adhered to the

¹ Per Tilghman, C. J., *Sweitzer v. Hummell*, 3 S. & R. 230-1.

² 7 Sm. & M. 217.

³ 13 Sm. & M. 52.

English rule. Lacy, J., says: "The reasonableness or justice of the rule may be somewhat difficult to discover at the present day, but the principle being unquestionably settled, it would work injustice and wrong now to change it, and we are not at liberty to do so to remedy a partial evil. We are not aware of any adjudication to the contrary, except a few cases in Blachford's Reports, and some loose *dicta* thrown out by the English Judges; and these are wholly insufficient to overrule the general current of both English and American authorities; and that too where the point has been expressly and solemnly ruled on many occasions."¹

12. Contrary to the rule as to a tender of *money*, that, in order to be available, it must be *absolute* and *unconditional*; the tender of a deed by the vendor, where the covenants are mutual, is not required to be made, but with the qualification that the vendee shall, concurrently with the acceptance of it, fulfil his part of the contract by payment of the consideration. Thus, in *assumpsit* by the vendor against the vendee of land, for not accepting it and paying the purchase-money, the plaintiff averred that he was seized in fee, and that the defendant agreed to purchase, on having a good title, and that his title was made good, perfect, and satisfactory to the defendant, and that he had been always ready and willing, and offered, to convey to the defendant, but the defendant did not pay the purchase-money. On demurrer, held, that these general allegations were tantamount to an averment of performance by the plaintiff, and entitled him to recover for non-payment of the purchase-money.²

13. The plaintiff covenants to sell a house to the defendant for a certain sum, the defendant covenanting to pay the plaintiff that sum on the day when the house shall be finished and the key delivered to the defendant, with a satisfactory deed and title, free of all incumbrances. Held, that the covenants were dependent, and that the plaintiff was not bound to make an unconditional tender of a deed, unless

¹ Byers v. Aiken, 5 Pike, 421.

² Martin v. Smith, 6 E. 555.

the defendant was willing to accept it and pay the purchase-money.¹ Wilde, J., says, the plaintiff "was not bound to make an unconditional tender of a deed, unless the other party was willing to accept it and to pay the purchase-money. An offer to perform the contract on his part, he having the ability to perform it, and a refusal by the testator to perform his part of the agreement, amount clearly to a breach."²

14. The defendant stipulated to pay a sum of money, on the plaintiff's assigning to him an equity of redemption. The declaration averred that the plaintiff was ready and willing and offered to assign, and tendered a draft of an assignment to the defendant for his approbation, and offered to execute and deliver, and would have executed and delivered such assignment to the defendant, but that he absolutely discharged the plaintiff from executing the same or any assignment whatever, and had not paid the money. On demurrer, the declaration was held sufficient.³

15. It has been held, that, where the power to perform a covenant on the part of the plaintiff depends on an act previously to be done on the part of the defendant, it is unnecessary for the plaintiff to aver a tender and refusal; an averment of readiness to perform is sufficient. Thus, where the defendant covenants to convey, and the plaintiff covenants to execute a bond and mortgage for the land, it is sufficient for the plaintiff to aver his readiness to perform.⁴ But, in a late case, where a vendor covenanted to execute and deliver a deed, and the vendee to execute and deliver, when the deed should be tendered, a bond and mortgage for the agreed price; a declaration that the vendee offered to make and deliver the bond and mortgage, without averring a tender, and requested the former to make and deliver a deed, which he refused to do, was held to be insufficient.⁵

16. The defendant purchased a leasehold estate, at auction, a condition of which was, that the purchaser should

¹ *Howland v. Leach*, 11 Pick. 154.

² *Ibid.* 154, 155.

³ *Jones v. Barkley*, Dougl. 684.

⁴ *West v. Emmons*, 5 Johns. 179.

⁵ *Campbell v. Gittings*, 19 Ohio, 347.

immediately pay down a deposit, in part of the purchase-money, and sign an agreement for payment of the remainder, within twenty-eight days, when possession should be given of the part in hand; and should have proper conveyances and assignments of the leases, without requiring the lessor's title, on payment of the remainder of the purchase money. Assumpsit, by the seller, for non-performance of the conditions. Declaration, in the first count, that the plaintiffs gave possession, according to the conditions, and were also ready and willing to give proper conveyances and assignments of the leases, on payment of the remainder of the purchase-money; in the second count, that the plaintiffs contracted with the defendant to sell, and the defendant to purchase an estate, and that, on the plaintiffs' having promised the defendant to convey, he promised to accept the conveyance, and pay the remainder of the purchase-money in a reasonable time; that, although the plaintiffs were ready and willing, and offered, to convey and assign to the defendant, and a reasonable time had elapsed for accepting the conveyance, the defendant would not accept it, or pay the remainder of the purchase-money. Motion in arrest of judgment, on the grounds that the plaintiffs had not set out their title, or tendered the conveyances. Held, the plaintiffs were not bound to set out their title, and the allegation of their being ready and willing to convey was equivalent to a performance of the conditions on their part; but, at all events, such objections were cured by a verdict.¹

17. The vendor is, of course, not required to tender a deed, where the covenants to convey and to pay the price are not mutual or conditional, but independent.

18. Agreement under seal to sell and purchase certain premises. The purchaser covenanted to pay, on or before a fixed day, as the consideration of such sale and purchase, a certain sum, with interest to the completion of the purchase, the vendor allowing thereout the same rate of interest for

¹ *Ferry v. Williams*, 1 Moore, 498.

so much of the money as might be paid in the meanwhile; and the purchaser agreed to pay for the conveyance and the stamp. Held, the conveyance was not a condition precedent to, or concurrent with, the payment, and the seller might therefore sue for the purchase-money and interest, without previously tendering a conveyance.¹

19. The tender of a deed may be dispensed with by the consent, waiver, or discharge of the vendee. Assumpsit by vendor against purchasers. The declaration stated, that, in consideration of the plaintiff's selling to the defendants certain land, to be paid for as soon as the conveyance should be completed, the defendants promised to purchase and pay for the same; that, although the plaintiff had allowed the defendants to enter into possession, and had always been ready and willing to make a good title, and offered to execute a conveyance, and would have tendered a proper conveyance, but that the defendants discharged him from so doing; yet the defendants did not pay, &c. Plea, that no conveyance had ever been made or executed. Held, on general demurrer, that the plea was bad, and the declaration good.²

20. But a parol waiver has been held insufficient. Thus A. covenants, that he will on or before a certain day convey to B., by such conveyance as B.'s counsel should advise, all the ground before conveyed to him by C., in consideration of which, B. covenants to pay a certain sum, and reserve certain rents, &c., to A. and to lay out a certain sum on the premises. Held, A. cannot maintain covenant against B., without averring either a conveyance, or a readiness to convey, on or before the day, and that B. prevented him by some act or neglect of his. And it is not sufficient, to show that after the day B. accepted a conveyance of ground-rents, in lieu of part of the land, and accepted that and the conveyance of the other part in lieu of the conveyance cov-

¹ *Mattock v. Kinglake*, 10 Ad. & Ell. 50.

² *Laird v. Pim*, 7 Mees. & Wels. 474.

enanted to be made by A.; for this is a substitution of a different agreement by parol, to which the covenant does not apply.¹

21. With regard to the form of an allegation by the vendor, that he has fulfilled his obligation to convey; it has been held, that, in an action on a bond to execute and deliver a deed of land, a plea of general performance, not stating specially the manner of performance, is bad.² Wilde, J., says: "In general, a plea of performance of a condition must show specially the manner of the performance. The exception is, where the matter is of so intricate and complicated a nature, or embraces such a variety of minute circumstances, that a particular statement would cause great prolixity."³

22. But, in assumpsit for the purchase-money of an estate, where the condition of sale was to pay on or before the 14th of June, on having a good title; the plaintiff averred, that he was seized in fee, and made a good and satisfactory title to the defendant, before the 24th of June. Held sufficient, without further particularizing the title.⁴

23. By an agreement between the plaintiffs and defendants, reciting that the plaintiffs had advertised for sale by auction certain collieries and other property, under a power contained in certain mortgages, in which property two of the defendants were or claimed to be incumbrancers, and that the plaintiff had, upon the request of the defendants, and for certain alleged considerations, agreed to postpone the sale; it was stipulated that the amount found due to the plaintiffs, on taking an account as therein mentioned, should be secured by the covenant of the defendants, by three instalments, payable, &c.; that the possession of the collieries, debts, and stock should be given up to the defendants; that, on payment of the first instalment, the whole of the property mortgaged to the plaintiffs (except the collieries)

¹ *Heard v. Wadham*, 1 E. 619.

² *Tinney v. Ashley*, 15 Pick. 546.

³ *Ibid.* 553.

⁴ *Martin v. Smith*, 2 Smith, 543.

should be released and conveyed to the defendants; and that the covenant should be forthwith prepared and executed by all parties within twenty-one days. In assumpsit against the defendants for not executing the covenant, the declaration alleged, that the plaintiffs were interested in the property as mortgagees, under and by virtue of certain mortgages, and were in possession of said collieries, and certain coal, &c., the produce of the collieries, in which property two of the defendants were or claimed to be interested as incumbrancers, and that the plaintiffs had advertised for sale, and were about to sell their interest in said property, under a power lawfully authorizing them in that behalf, and contained in the said mortgages, of all which the defendants had notice; and, after setting out the agreement, assigned for breach the non-execution by the defendants of the covenant. Held, on special demurrer, that the production of a title to convey was not a condition precedent to the plaintiff's right to sue, the parties not standing in the relation of vendors and purchasers; also, that there was no repugnancy or inconsistency in the allegation that the plaintiffs were about to sell their interest under a power, the term "power" being used in its popular and not in its artificial sense; also, that the allegation of interest in the plaintiffs was sufficiently certain.¹ (a)

¹ *Hallewell v. Morrell*, 1 Scott, 309.

(a) The general rule of the English law, requiring preparation and tender of the deed by the vendee, is not applicable, where the contract expressly imposes the duty upon the vendor. Thus a contract provided, that a lease should be drawn, prepared, and executed at the sole expense of the lessor. In an action on the agreement by the lessee; held, it was not necessary to aver that a lease was tendered to the lessor for execution. *Price v. Williams*, 1 Mees. & Wels. 6.

Upon an award to perform a purchase and pay the price upon conveyance by the plaintiff to the defendant, the defendant is not in contempt before tender of a conveyance executed, demand of the money, and refusal to accept and pay. *Standley v. Hemmington*, 6 Taunt. 561.

CHAPTER XXX.

CLAIM OF THE VENDEE, IN CASE OF DEFECTIVE TITLE, OR OTHER BREACH OF CONTRACT.—FORM OF ACTION.—TENDER OF PURCHASE MONEY AND DEMAND OF DEED, ETC.

1. WHILE, as has been seen, the vendor must in general prove a valid title to the land sold, in order to recover the purchase-money; the vendee, on the other hand, has his remedy against the vendor, to recover back money already paid upon the faith of such title, upon the ground that it has proved to be defective. The rule often found stated in the books, that the action of *assumpsit* does not lie for the purpose of trying a question of title to real property; has never been held to preclude this form of action in the case mentioned, although founded immediately and solely upon an alleged want of title, and although the defence, if any, must ordinarily be such as to turn wholly upon this question. The correct view would seem to be, that the plaintiff does not claim a title to the land in question, but seeks to recover upon the very ground that no title can be made; while, although the defendant *may* set up his title as a defence, and thereby bring it in issue, he may also make various other defences; and moreover a judgment in his favor will not settle the title, as between him and any adverse claimant, not a party to the suit. (a)

(a) It is said in a work of high authority, (1 Chit. Pl. 342,) that "Courts will not allow a colorable title to land, &c., to be tried in this form of action, but the plaintiff must declare in tort." This remark, however, is applied more particularly to the *waiver of torts*, which is often allowed with reference

2. Hence it has been held, that an action for money had and received may be maintained, to recover money received by the defendant as a deposit on the purchase of an estate by the plaintiff, to which the defendant cannot make the stipulated title.¹

3. The plaintiff had from time to time paid rent to the defendants for certain premises which he held of them, but to which it afterwards turned out they had no title. The plaintiff, having been ejected, and compelled to pay the mesne profits for the time during which he held of the defendants, brings assumpsit to recover the amount of the rent paid to them. It was objected, that title to land could not be tried in an action for money had and received; but the objection was overruled. Lord Tenterden says, "here was no trial of title. It had been previously ascertained, that the defendants had no title whatever to this land in respect of which the plaintiff had paid rent to them; and the defendants did not at the trial of this cause claim to have any title."²

4. A defendant, supposing himself the legal representative of tenant for years, sold the term and delivered the lease to

¹ *Alpass v. Watkins*, 8 T. R. 516; ² *Newsome v. Graham*, 10 B. & C. Elliot v. Edwards, 3 B. & P. 181; 234.
Eames v. Savage, 14 Mass. 425.

to personal property, but not, as this writer here takes occasion to say, in case of injuries to real estate, which involve the title. So, in an action for money had and received, it appeared that the holder of a note, indorsed to him as security for a debt, having recovered judgment against the maker and levied on the rents and profits of his land for a term of years, signed an unsealed writing, promising to pay the plaintiff all the rents which he should receive after payment of his debt, or else allow the plaintiff the use and improvement of the land. The debt having been paid in his lifetime, it was held, that rents received by his heir under color of descent might be recovered by the plaintiff in an action for money had and received; the plaintiff not claiming any title to the estate in question, nor contesting any title set up by the defendant. *Arms v. Ashley*, 4 Pick. 70. So the rule in question does not apply to cases where only the past rents of land are in question. *Money Penny v. Bristow*, 2 Russ. & My. 117.

the plaintiff, but without any assignment or formal conveyance, saying, the premises were his, and, if any thing happened, he would see the plaintiff righted. Held, the plaintiff might maintain an action for money had and received against him, the rightful administrator of the tenant for years having ousted the plaintiff by ejectment. Lord Kenyon said, "I do not wish to disturb the rule of *caveat emptor* adopted in *Bree v. Holbeck*, and in other cases where a regular conveyance was made, to which other covenants were not to be added; for in general the seller only covenants for his own acts and for those of his ancestor, in which respect the case of a mortgage differs from it, as a mortgagor covenants that at all events he has a good title; but here the whole passed by parol, and it proceeded on a misapprehension by both parties, that the defendant was the legal representative of the lessee, though it turned out afterwards that he was not. As, therefore, the money was paid under a mistake, I think that an action for money had and received will lie to recover it back."¹

5. The plaintiff purchased of the defendant a term for years, paying him \$1,800 therefor. At the time of the purchase, both parties honestly but erroneously supposed that the defendant was the owner of the term. Held, the plaintiff was entitled to recover back the money.² So, where the defendant agreed to sell an estate to the plaintiff upon the deposit of a sum of money, but was afterwards disabled from performing the agreement; held, the plaintiff might recover the deposit, though the agreement for sale was by deed.³

6. A. devised to B., C., D., and E., two parcels of land, in trust to sell, and divide the money among his brother's and sister's children. The devisees, E. being one of twenty-four persons entitled under the will to a share of the money, were proceeding to sell, when it was agreed by the three first

¹ *Cripps v. Reade*, 6 T. R. 606.

² *Martin v. McCormick*, 4 Seld. 331.

³ *Greville v. Da Costa, Peake*, Ad. Cas. 113.

trustees and the twenty-three other persons entitled to the money, that E. should become the purchaser of the two parcels, paying £300 for one and £700 for the other. A conveyance was accordingly prepared and executed by B. and C. only, upon which E. took possession and paid the purchase-money, which was divided among the several persons entitled under the will. E., being afterwards evicted from the smaller parcel, in consequence of a defect in the title derived under the will, brought an action for money had and received against one of the twenty-three persons, to recover the share of the £300 received by him, at the same time refusing to give up the parcel of land for which £700 had been paid. Held, that he was entitled to recover.¹

7. A father made a conditional arrangement, by parol, with the defendant, on behalf of his son, the plaintiff, for the purchase of certain lands, which was to be ratified or annulled by the plaintiff, at his discretion, on attaining majority. Accordingly, the father advanced to the defendant large sums of money, on account of the plaintiff, and it was agreed that the defendant was to pay back the money, with interest, to the plaintiff, in case he should decline the arrangement. The plaintiff, shortly after attaining age, declined, and gave notice thereof to the defendant. Held, the money belonged to the son, and could be recovered in an action for money had and received.²

8. It has been held, that, if a purchaser has paid any part of the purchase-money, and the seller refuses to complete his part of the contract, the purchaser may elect either to affirm the contract by bringing an action for its non-performance, or to disaffirm it *ab initio*, and bring an action for money had and received. Thus, if there be a defect in the title, which the vendor, with knowledge of its existence, fraudulently suppresses, and receives from him a part of the purchase-money, the purchaser may recover back such money in an action for money had and received.³

¹ Johnson v. Johnson, 3 Bos. & Pull. 162.

² Johnson v. Evans, 8 Gill, 155.

³ Lyon v. Annable, 4 Conn. 350.

9. But, on the other hand, the right to recover back money paid by the vendee of real estate, as such, has been subjected to nice limitations. Thus it is said, the cases in which a vendee may recover back money paid on a contract for the purchase of real estate, are, 1st, where the rescission is voluntary and by mutual consent; 2d, where the vendor cannot or will not perform his part of the contract; 3d, where he has been guilty of fraud in making the contract.¹ Otherwise where the vendor is in no default, and the rescission arises from an unexpected default of the vendee.²

10. Where a valid contract was made to pay for and receive a conveyance of land, and the money was paid, but no deed executed; held, the vendee could not rescind the contract and recover back the money, but should sue on the agreement as one still subsisting.³

11. The defendant agreed, in consideration of £10, to let a house to the plaintiff, which the latter was to repair, and execute a lease of it within ten days; but the plaintiff was to have immediate possession, and in consideration of the premises to execute a counterpart and pay the rent. The plaintiff took possession and paid the £10 immediately, but the defendant neglected to execute the lease and make the repairs beyond the period provided, notwithstanding which the plaintiff still continued in possession. Held, the plaintiff could not by quitting the house rescind the contract, and recover back the £10 in an action for money had and received; but could only declare for breach of the special contract; for a contract cannot be rescinded by one party for the default of the other, unless both can be put *in statu quo*.⁴

12. Money paid upon a parol contract for the purchase of land, which is void under the Statute of Frauds, cannot be recovered back, while the vendor is ready and willing, on his part, to perform the contract; ⁵ but only on the unwillingness

¹ Battle v. Rochester, &c. 5 Barb. 414.

² Ibid. Green v. Green, 9 Cow. 46.

³ Fuller v. Hubbard, 6 Cow. 13.

⁴ Hunt v. Silk, 5 East, 449.

⁵ Collier v. Coates, 17 Barb. 471.

or inability of the vendor to convey, or a mutual abandonment of the contract.¹ Thus the plaintiff, by parol, agreed to buy of the defendant a tract of land for \$650, one half of which was to be paid on a certain day, when the contract was to be consummated and possession delivered. The plaintiff, at the time of the contract, paid \$50 in part performance, but on the day fixed was unable to pay the balance, and refused to complete the contract, though the defendant was willing to do it. Held, the plaintiff could not recover the \$50, there being no evidence that the defendant had assented to a rescission of the contract.²

13. The defendants, assignees of a bankrupt, proposed to sell to the plaintiff a piece of land, with all faults and defects. Before any conveyance was executed, the plaintiff asked the defendants whether any rent had ever been paid for the land. They replied that none had been paid by the bankrupt, or by any person under whom he claimed. In fact, rent had been paid by the person who had sold to the bankrupt, and he recovered possession of the lands. Held, in an action to recover the purchase-money, it was properly left to the jury to say, whether the assignees *bonâ fide* believed their own representation; and, the jury having found that they did, that the plaintiff was not entitled to recover.³

14. A county being about to erect a court-house, the plaintiff, being interested in having it located in a particular place, signed a subscription paper, promising to pay the sum affixed to his name, "for land sufficient to set the court-house upon" at that spot, provided it was located there. Defendant, the owner of the land, thereupon executed a deed to the county, reserving a reversionary interest in case the county should at any time cease to occupy it as a court-house. The plaintiff paid the amount of his subscription. The court-house was erected, but was burned two years afterwards, and the county then determined, that they would

¹ *Sims v. Hutchins*, 8 S. & M. 328.

² *Ibid.*

³ *Early v. Garrett*, 9 Barn. & Cress. 928; 4 Mann. & Ryl. 687.

not rebuild on that place, unless they could have the remainder of the lot, free of expense to the county, and it was accordingly purchased of the defendant at a price equal to the whole value of the lot previous to the first purchase. Held, these facts did not entitle the plaintiff to sustain assumpsit for money had and received against the defendant for the amount of his subscription.¹

15. Where the plaintiff contracted to purchase land, which the vendor afterwards conveyed to trustees for the benefit of his creditors, and which was offered by them for sale, and the plaintiff at the sale agreed with the vendor and his creditors, that the land should be sold and the money held subject to the claim of the rightful owner; held, assumpsit for money had and received would not lie by the plaintiff against the trustees.²

16. Where the obligor in a bond, conditioned to convey an undivided moiety of a mill on payment of certain sums, had disabled himself from performing, by mortgaging one undivided half of the mill to a third person; held, although the obligee might thereby be excused from tendering performance on his part, he could not maintain assumpsit to recover the money paid, on the ground that the obligor by his acts had rescinded the contract, the facts not showing clear and unequivocal proof of such rescinding when the action was brought.³

17. We have already, in connection with the duty of the vendor to convey a good title, considered the question, as to the particular acts required by law of the respective parties, in reference to the execution and tender of the deed, by which a contract of sale and purchase is consummated. It has been seen, that the rule of the English law has been for the most part reversed in this country, by requiring the vendor, instead of the vendee, to tender the deed. In the same connection, we have had occasion to refer to the duty

¹ *Barnes v. Baylies*, 18 Verm. 430.

² *Gaither v. Hetrick*, 10 Ired. 114.

³ *Goddard v. Mitchell*, 17 Maine, 366.

of the vendee, as to demanding a deed.¹ To what has been already said we need only now add, that, in general, the vendee cannot maintain an action for money paid by him as a deposit on the purchase of an estate, to which the defendant fails to make a title; without showing that he has tendered the purchase-money and demanded a title.² While on the other hand it has been held, that, if the obligor of a title-bond had no title at the time the deed was to be executed, the obligee may sue on the bond without having demanded the deed.³ (a)

18. As to *the time* within which the vendee may maintain an action against the vendor, it has been held, that, in case of a bond for a deed, to be delivered in reasonable time after payment of a certain sum by the obligee; ninety days is not a reasonable time, though before action brought on the bond.⁴

19. The defendants gave the plaintiff a bond, reciting, that for a valuable consideration they had contracted to sell him 750 acres of land, to be selected from their lots, in case he should, at his own expense, select and survey that quantity; and that it was expected that he should complete his selec-

¹ See Vol. 1, p. 37.

² Hudson v. Swift, 20 Johns. 24.

³ Blann v. Smith, 4 Blackf. 517 ;
Tarwater v. Davis, 2 Eng. 153.

⁴ Aiken v. Sandford, 5 Mass. 494.

(a) It is unnecessary to refer anew to the peculiar doctrine of some of the cases in New York, that a vendee is required to make a *double* demand for a deed. (See Vol. 1, p. 37.)

With regard to the American rule as to the tender of a deed, we may here add the remark made by the Supreme Court of the United States that the rule requiring the purchaser of property to prepare and tender a deed of conveyance of the property to the vendor, to be executed by him, although prevailing in England, does not seem to have been adopted in some of the States of the United States. In Ohio, the rule does not prevail. The local practice ought certainly to prevail, and to constitute the proper guide in the interpretation of the terms of a contract. Taylor v. Longworth, 14 Pet. 172; 1 McLean, 395.

In Maine, the vendor must prepare the deed. Hill v. Hobart, 16 Maine, 164.

tion within two years from the date of the bond; and conditioned, that the defendants, on being duly notified of the selection, with the numbers of the lots, &c., and on the giving up to them of the bond, should execute and deliver to the plaintiff a good and sufficient warranty deed thereof. Held, the bond did not require absolutely that the selection should be made and notice of it given, within the two years, but only within a reasonable time.¹ (a)

¹ *Tinney v. Ashley*, 15 Pick. 546.

(a) The following miscellaneous cases illustrate the subject of this chapter with more especial reference to the recovery of a *deposit*, upon the vendor's failure to comply with his contract:—

Where a good title was not made out, it was held, that the purchaser was entitled to recover his deposit from the auctioneer, without notice of the contract having been rescinded. *McComb v. Wright*, 4 Johns. Ch. 659.

The plaintiff purchased an estate sold by the defendant at auction, and signed a memorandum of agreement, in which he was described as the agent of A. B.; who, however, afterwards repudiated the contract. After notice of this fact to the agent of the vendor, the plaintiff pays the deposit-money, according to the conditions of sale. The title proving defective, held, he was entitled to recover the deposit in his own name. *Langstroth v. Toulmin*, 3 Stark. 145.

In an action to recover a deposit on the ground of a defect in the vendor's title, specified on rescinding the contract; no other objection can be insisted on at the trial, if it be of such a nature, that it might, if then stated, have been removed. *Todd v. Hoggart*, 1 Mood. & Malk. 128.

In an action for money had and received by a purchaser against the vendor to recover back the deposit, the conditions of sale not being complied with, the defendant, by Judge's order, may obtain a particular of the grounds on which the plaintiff relies, to which the latter will be confined at the trial. But, if there has been no particular, the plaintiff may recover, by proving a breach of the conditions never before mentioned to the defendant. *Squire v. Tod*, 1 Camp. Cas. 293.

With regard to the form of action, by which the vendee may recover back the purchase-money paid, it is held, that, to warrant an action for money had and received, to recover money paid under a special contract to convey land, as strict a performance must be shown by the plaintiff, as if he had sued on the contract; unless it has been either expressly rescinded or impliedly so, as by nothing having been done under it for a long time, or by

the defendant having acted inconsistently with it. Thus, where a party covenanted to pay money for land by instalments, on completing which he was to have a deed, and he took possession, and continued it for some time, making partial payments, but finally failed to pay, and the vendor took possession ; in an action for money had and received, to recover back the money paid, held it would not lie. And, the covenant to pay being independent, held no breach, that the defendant had never any title to the land ; for *non constat*, had the plaintiff paid, that the defendant might not have procured a title and conveyed. *Green v. Green*, 9 Cow. 46

CHAPTER XXXI.

NOTES AND OTHER SECURITIES, GIVEN FOR THE PURCHASE-MONEY OF LAND ; ACTIONS THEREUPON AND DEFENCES TO SUCH ACTIONS ; TENDER OF DEED ; TOTAL OR PARTIAL FAILURE OF TITLE ; COVENANTS OF WARRANTY.

1. HAVING considered the right of a vendee to recover purchase-money already paid, where the vendor fails to make a good title to the property sold ; we now proceed to treat the same subject in another aspect, viz : the liability of the purchaser upon a note or other security given by him for the price of the land. Upon the various questions connected with this topic, the authorities are by no means uniform, as will be seen by a citation of the more prominent and later cases ; but the general result seems to be, that, whenever the money, if actually paid, might be recovered back, there, *à fortiori*, the party who would otherwise be plaintiff, standing in the more favorable position of defendant, and therefore having the burden of proof less stringent upon him, may make a valid defence to an action upon any security given for the price.

2. Upon this ground, the law generally requires a *tender* of a conveyance, in order to maintain a suit upon the security given for the price. (a) Thus, if a note be given for the price of land, under a contract that, if the note were paid at maturity, the payee would convey the land to the maker ; a

(a) It has been held, that, in declaring upon a note given for the purchase money of land agreed to be conveyed, it is necessary to set forth the consideration of the note and to aver performance of the agreement. *Perry v. Rice*, 10 Texas, 367.

tender of a sufficient deed is necessary, on the day of maturity of the note, to render the maker liable on the note to the payee, and a subsequent tender is insufficient.¹ So, where a vendor gave the vendee a bond for a deed on payment of notes, on time, given for the price; held, an action did not lie on the notes, without making or offering to make a deed of the land, or showing a sufficient reason for not doing so.² So, in an action on a sealed note; and a plea that the consideration was, that a certain lot of land should be conveyed to the maker on the payment of four notes, of which all but the one in suit had been paid; held, the plea was sufficient, as the plaintiff had not offered to convey on payment.³ So, if several notes, payable at different times, be given for the price of land, under a contract for a conveyance upon payment in full; a suit on the notes, after they have all become due, will not lie, without a conditional tender of a deed.⁴

3. Several notes, payable at different times, were given for the purchase-money of land. To an action on all the notes after they had become payable, the defendants pleaded a contract by them to pay the notes as they should become due, and in that case the plaintiffs should convey the land, &c., and averred in the plea, that the plaintiffs had not made or tendered a deed on the day said last notes became due, "according to the tenor and effect of their agreement." Held, on general demurrer, that the plea was good; that, the suit not being brought on the notes first becoming due, until all the notes had become payable, they became subject to the same condition, that a conveyance should be tendered, as those last becoming due.⁵

4. Assumpsit on a note by the assignee against the maker. Plea, that the note was given in consideration of a lot of land; and setting out a contract, that, on the day the note fell due, the payee should be the owner of the lot, and

¹ *McCulloch v. Dawson*, 1 Cart. 413.

² *Stingle v. Hawkins*, 8 Blackf. 435.

³ *Mix v. Ellsworth*, 5 Ind. 517.

⁴ *Hook v. Nebeker*, 1 Cart. 257.

⁵ *McCullough v. Dawson*, 1 Smith, 245.

the deed be offered to the defendant, on payment of the note, unless there was good cause for not making the offer. The plea further averred, that the deed was not made before commencement of suit, and denied the payee's ownership of the lot. Replication, that the deed was tendered, and payment of the note demanded and refused, before the suit was commenced, concluding to the country. Judgment for the plaintiff. Held, the finding of the Court, so far as this plea was concerned, was a nullity, the plea not having led to any issue of fact; also, that the defendant could assign as error, that this cause, in which there were several pleas, had been tried without an issue to the plea referred to, as that plea was a valid defence to the action.¹

5. In an action of assumpsit on a note, a plea, that the note was given for the price of land, under a contract that a conveyance should be given on payment of the note at maturity, and that no deed had been given or tendered on the day of maturity, "according to the tenor and effect of the agreement;" is a sufficient allegation that the deed had not been tendered on payment of the note, on that day.²

6. The plaintiff gave a bond to convey to the defendant a parcel of land, which the defendant had agreed to purchase, and the defendant gave a promissory note on demand, not negotiable, for the amount of the agreed consideration, but taking from the plaintiff a receipt, stating that, if the bargain should be rescinded, the note should be given up, upon the defendant's giving up the bond. The bond, note, and receipt bore the same date. Held, that these papers constituted one contract; that the contract was valid; and that an action would not lie on the note, without a previous tender of a deed of the land.³ The Court say, "the plaintiff, on his part, agreed to convey the land to the defendant when he should pay the purchase-money, and the defendant agreed to pay the purchase-money when the plaintiff should convey the

¹ *Burton v. Johnson*, 2 Cart. 339.

Warner v. Hatfield, 4 Blackf. 392;

² *McCulloch v. Dawson*, 1 Cart. 413.

Taylor v. Perry, 5 Blackf. 599; *Smith*

³ *Hunt v. Livermore*, 5 Pick. 395; *v. Henry*, 2 Eng. 207.



land. As no time for the conveyance or for the payment is mentioned, the law supplies the deficiency by providing that the contract should be executed in a reasonable time. It is clear to our minds that the contract is to be construed as containing dependent stipulations. Neither party intended to trust to the personal security of the other. If Hunt had in a reasonable time offered to give a good deed of the land, and had demanded payment of the money mentioned in the note, and Livermore had refused to accept the deed and to pay according to his engagement, Hunt would have had his remedy at law against Livermore for the purchase money. On the other hand, if Livermore had in a reasonable time offered to pay his note, and had demanded a deed, and Hunt had refused to accept the money and to give the deed simultaneously, Livermore would have had his remedy at law against Hunt for the damages sustained by his not conveying the land according to his agreement. If the stipulation contained in the receipt of the plaintiff, to deliver up the note upon the defendant's delivering up the bond, 'provided the bargain is not carried into effect,' were to be construed to give either party an election at his own pleasure to annul the contract, it is evident that the contract could never be carried into effect against him who should please to avoid it. It would in effect have no binding operation."¹

7. But, although the law requires a tender of a conveyance in order to maintain a suit upon the security given for the price, such tender need not be absolute. A conditional tender of the deed on payment of the note is sufficient.²

8. Upon the same ground it has been often held, that *want of title* in the vendor is a good defence to an action upon a note given for the purchase-money. Thus, in an action of assumpsit on a promissory note for the purchase-money of land, it is a good defence for the vendee in pos-

¹ Per Putnam, J., *Hunt v. Livermore*,
5 Pick. 397.

² *Gorham v. Reeves*, 1 Cart. 421.

session under a bond for the title, and before he has accepted a deed, to show failure of the vendor's title, before eviction, although it would be otherwise after he has taken a deed, with covenants of warranty;¹ or that the vendor was not the owner of the land, on the day when the deed was to be delivered and the note paid.² So, in an action upon a promissory note, a plea, that the consideration of the note was the sale of certain lands to the defendant, to which the plaintiff represented he had a good and valid title, whereas in fact he had no title, is a bar.³

9. The only consideration of a promissory note, was a promise by the payee to convey to the maker, on payment of the note, a tract of land, if the payee should own it, and, if not, to buy it of the owner as cheap as he could, and let the maker have it at cost. The payee died insolvent, before the note became due, without any title. Held, the consideration of this note had totally failed, and the maker might treat it as a nullity.⁴

10. Plaintiff sold to defendant a tract of land, with a cabin, &c., and contracted to deliver possession in the same situation it then was. The cabin being burned before delivery, the value of the cabin and rails was decreed to be set off against the judgment at law on the bond for the purchase money.⁵

11. A., in June, 1811, agrees to purchase a house of B. for £1,000, paying £300 down; full possession to be given by the 1st of June, 1812. B. is arrested in June, 1811, on which A. accepts a bill for B. in favor of B.'s creditors, payable if the house should be given up on the 1st of June, 1812. At B.'s request, A. puts his nephew into the house to take care of it, while B. remains in custody. B., having a bad title to the house, gives up all claim to it, and A. purchases it of the real owner, being allowed the £300 which

¹ *Feemster v. May*, 13 S. & M. 275; *Wiggins v. McGimpsey*, 13, 532; *Johnson v. Jones*, 13, 580; *Mobley v. Keys*, 13, 677.

² *Gorham v. Reeves*, 1 Smith, 239.

³ *Myers v. Aikman*, 2 Scam. 452.

⁴ *Tillotson v. Grapes*, 4 N. H. 444.

⁵ *Combs v. Fisher*, 3 Bibb, 51.

he had paid to B. Held, that the possession which A. had of the house from B. was not such a compliance with the condition of the acceptance, as to support an action by the holder of the bill against A.¹

12. The plaintiff, a trustee under a will, contrary to the trust, executed to the defendant, who knew of the trust, a bond for the conveyance to him, at a stipulated time, of certain of the testator's real estate, taking a note for the purchase-money. Held, a sufficient defence to a suit for an instalment of the note, that the plaintiff never could make a valid conveyance of the land to the defendant.²

13. Agreement, when certain payments should be made, to convey certain lands. Two notes were made at the same time, and the agreement referred to the notes. In a suit on the notes, it being alleged that the plaintiff could not convey, not having title; held, the notes and the agreement should be construed together, that the agreement was not the real consideration of the notes, but the estate to be conveyed, and, if the plaintiff could not give a good title, there was a failure of consideration.³

14. At the time of giving a note for the conveyance of land, it was agreed in writing, that if, before the maturity of the note, it should be proved that the grantor had no title, the note should not be paid. Held, the maker might set up such agreement, in defence to a suit brought on the note, by one to whom it was indorsed before maturity, with notice of the stipulation.⁴

15. Where a note was given on a sale of real estate, to which the vendor had neither title nor color of title, nor possession; held, there was no consideration for the note, and a guarantor thereof, the guaranty being made when the note was given and without consideration, was not liable.⁵

16. In an action of assumpsit on a note for the price of land, under an agreement that, if the note were paid at

¹ *Swan v. Cox*, 1 Mar. 176.

² *Sweeney v. Sampson*, 5 Ind. 465.

³ *Davis v. McVickers*, 11 Ill. 327.

⁴ *Bean v. Flint*, 30 Maine, 224.

⁵ *Fisher v. Salmon*, 1 Cal. 413.

maturity, the payee would convey the land, an allegation in the plea, that the payee was not, when the note was executed, nor had been from thence hitherto, the owner in fee of the land, is a sufficient denial that he was the owner at the day of maturity of the note.¹

17. Where the defendant pleaded that the notes sued on were given for land, and that the consideration had failed, by reason of the plaintiff's having no title; held, a judgment in favor of the plaintiff for the purchase-money, and a decree in favor of the defendant for the land, would not preclude the defendant from his remedy against the plaintiff, if the land within the metes and bounds should prove to be less than was contracted for, and if the defendant was deceived by the plaintiff as to the quantity.²

18. Action upon a promissory note, payable twelve months after date, by an assignee. Plea, that the note was assigned after it became due, and that the consideration was a bond of the same date executed by the payee to the makers, to convey certain lands by deed, in fee-simple, with general and special warranty, within four months from the date of the note, and that the payee did not within that time convey the lands according to his covenant, and therefore the consideration of the note had failed. Held, a bar. So, likewise, a plea, setting forth the same facts, except the failure to convey, and averring that the payee, neither at the date of the note, nor within said four months, had any legal title to the lands. So a plea, setting forth the same facts as the first plea, except in alleging that the payee had not conveyed the premises, and it was out of his power to convey them according to his covenant, because of certain judgments against him, which were liens on the premises.³

19. Where a mill seat was the object of the purchase of a tract of land, which is taken away by an elder grant, it is

¹ *Gorham v. Reeves*, 1 Cart. 421.

² *Tison v. Smith*, 8 Texas, 147.

³ *Tyler v. Young*, 2 Scam. 444.

a good cause to rescind the contract, and may be pleaded in discount against the bond given for the consideration-money.¹

20. In case of a purchase of the interest of a vendor in a remainder in fee, expectant on an estate tail; if, at the time of the contract, the tenant in tail had actually suffered a recovery, of which both parties were ignorant till after the conveyance had been executed, and an absolute bond given for the purchase-money; equity will rescind the contract, and order such bond to be delivered up to be cancelled, and that all interest paid on it shall be refunded. (a) But the costs were not allowed on either side.²

21. A promissory note was made for the purchase-money of land, conveyed by deed with warranty. At the time of the conveyance there was a judgment against the grantor, under which the land was afterwards sold and conveyed. Held, an action on the note could not be maintained, as the consideration had wholly failed; the title of the promisor being extinguished by the sale under the judgment, though he had not yet been evicted; for he was liable to be evicted, and was responsible for the mesne profits.³

22. Upon the same principle, a *partial* want or failure of title has been usually held to constitute a partial defence to a suit upon a note given for the purchase-money. Thus, in an action upon a note, given for the purchase-money of land, over and above the amount of a mortgage on the land, represented by the vendor to be a certain sum; if the sum due at the time exceeded that amount, the excess will be deducted from the amount of the note.⁴

¹ Gray v. Hankinson, 1 Bay, 278;
Bell v. Huggins, 1 Bay, 327.

² Hitchcock v. Giddings, 4 Price, 135.

³ Frisbee v. Hoffnagle, 11 Johns. 50.
⁴ Stiles v. Sherman, 34 Maine, 344.

(a) Where a contract for the sale of land is rescinded in equity, the vendee is discharged from the payment of his purchase-money, and entitled to have his bond given up. Lowder v. Noding, 8 Ired. Eq. 208.

23. A. covenanted with B. to give him "a good sufficient general warranty deed" of a piece of land, and B. paid a part of the purchase-money, and gave his note for the balance. A. sued the note, and B. filed a bill in equity for specific performance, as A. had tendered a deed, which reserved a right in C. to dam up a stream running through the land, but which was known to B. when he purchased. Held, that by this reservation A.'s covenant was broken, as he was bound to make a title clear from all incumbrances, and that this breach was a good defence to the action on the note, and a good ground for the bill in equity. The measure of damages was held to be the deterioration of the land by the existence of this easement, and the fact of B.'s knowledge of the easement was held not to affect A.'s covenant.¹

24. In a suit by the assignee of a note against the maker, the plea was, that the note was given for part of the consideration of the sale of several pieces of real property, of which a deed with covenants of clear title and warranty was executed at the time of sale; that at that time two of them were incumbered by judgments and mortgages amounting to more than the note; that the defendant, to save them, had been compelled to pay off the incumbrances; that the note was for the only unpaid part of the purchase-money; and that the payee was insolvent; wherefore the consideration of the note had failed. The replication was, that the defendant paid the incumbrances and the balance of the purchase-money, after notice of the assignment of the note. Held, the plea was good, and the replication bad.²

25. Evidence of fraudulent representations by the payee of a promissory note, as to the value of the land for which the note was given, has been held admissible to show a partial failure of consideration, in a suit brought by one to whom the note was indorsed after it was overdue.³

26. The general rule above stated, however, is subject to

¹ *Morgan v. Smith*, 11 Ill. 194.

² *Doremus v. Bond*, 8 Blackf. 368.

³ *Coburn v. Ware*, 30 Maine, 202.

qualifications and exceptions, growing out of the language of the contract or the circumstances of the case.

27. Thus it is held to be no defence to an action by the payee against the maker of a promissory note, that the payee had agreed to convey an estate to the maker, in consideration of a sum of money then paid or secured to be paid to the maker (being the sum mentioned in the note) and of a further sum to be paid at a future day, and that such estate had never been conveyed.¹ So, when a bond is given to convey, on payment, with a right in the purchaser to take possession and hold till some failure on his part, and notes are given to secure annual payments, those notes are recoverable, whether the purchaser takes possession or not; although it would be otherwise, if the obligor had conveyed away his title, so as not to be able to fulfil the bond.² So a defendant cannot resist payment of a note given in purchase of a house and lot, on the ground that the plaintiff had no title, if the defendant remain in possession.³ So a vendee who takes and retains possession, under a parol contract of purchase, cannot defeat a recovery on his note, given for the purchase-money, on the ground of want or failure of consideration, it not appearing that the vendor has failed or refused to comply with his contract.⁴ So a purchaser who has paid part of the purchase-money, and given a bond for the residue, and is in undisturbed possession, will not be relieved against payment of the bond, or proceedings on the accompanying mortgage, on the mere ground of a defect of title, there being no allegation of fraud in the sale, nor any eviction; but must seek his remedy at law, on the covenants in his deed.⁵ So, where land was conveyed upon condition that the deed should be void, if the notes, which were the consideration for the deed, should be paid before a specified time, and the notes were not paid at the time; held, the condition constituted no defence to an action on the notes.⁶ So, if A. gives a bond

¹ *Spiller v. Westlake*, 2 B. & Ad. 155.

² *Chandler v. Marsh*, 3 Verm. 161.

³ *Isler v. Egger*, 17 Mis. 332.

⁴ *Gillespie v. Battle*, 15 Ala. 276.

⁵ *Abbott v. Allen*, 2 Johns. Ch. 523.

⁶ *Hodsdon v. Smith*, 14 N. H. 41.

to convey land to B., upon payment of the purchase-money, and receives notes for the purchase-money, and afterwards sells the same land to C.; B. cannot therefore avoid payment of the notes, because, payment being a condition precedent, A. is not in default until payment.¹ So, when the grantee in a quitclaim deed gives his note for the consideration, with a written agreement that he shall pay the note, unless within twelve months he shall make it appear, by due course of law, that neither the grantor nor his wife have any claim, as heirs, to the land; the grantee cannot defend an action on the note, unless he has complied with the agreement.² (a)

28. Action on a promissory note. It was agreed between the plaintiff and defendant, that the former would convey to the latter certain land, if certain notes, given at the same time, should be paid at maturity; and, on failure of such payment, the agreement to be void; and the defendant to pay all damages, and forfeit any previous payments. Held, the notes and the promise to convey were independent, and this suit might be maintained, without showing a conveyance or offer to convey; and that, by enforcing the notes, the plaintiff waived the right to avoid his covenant to convey and claim damages, although originally he might elect between the two modes of relief.³

29. A note, founded on the payee's agreement to convey

¹ *Foster v. Jared*, 12 Ill. 451.

³ *Manning v. Brown*, 1 Fairf. 51.

² *Carter v. Harber*, 18 Mis. 204.

(a) The promisee in a note, by an agreement under seal, executed on the same day with the note, covenanted with the promisor, that, "if said note should not be paid at the expiration of the said ten years," he would "give up said note" to the promisor, provided the latter should execute to him a quitclaim deed of certain land. Held, this agreement (assuming that the note and agreement constituted an entire transaction, which the Court did not decide) did not preclude the promisee from enforcing payment of the interest, and such instalments as should become due, before the expiration of the ten years. *Ewer v. Myrick*, 1 Cush. 16.

to the promisor land belonging to a third person, the payee having notice of such ownership, is not invalid for want of consideration ; if the owner conveys to the promisor, in execution and pursuance of the contract, and the promisor accepts the title.¹ So the plaintiff, holding a written agreement of A. that he would convey to the plaintiff certain premises, sold them by parol to the defendant, with the assent of A., and the name of the defendant was by mutual consent inserted in the written agreement of A., in the place of the plaintiff. It afterwards appeared, that A. had no title. Held, in an action on a note given for the price, the defendant could not set up a failure of consideration, for between the plaintiff and defendant the agreement was completely executed, and the defendant acquired all the title which the plaintiff pretended to have, or assumed to sell, and, by the agreement for which the note was given, the defendant became entitled to demand the deed of A.² So, where a purchaser executed a note, at the request of the vendor, to a stranger, for the purchase-money ; held, he could not defend an action on the note, on the ground of failure of consideration, because the vendor had not conveyed the legal title to him.³ So, where the trustees of a land company, in whom the legal title to the land owned by the company was vested, received a promissory note of a purchaser of a lot, and agreed to convey the same to him on payment of the note, and afterwards one of the trustees relinquished his trust, and made a conveyance of his interest in the land of the company to the other trustees ; it was held, that, notwithstanding such relinquishment and conveyance, an action might be maintained on the note in the name of all the trustees.⁴

30. In an action upon a bill, drawn by one who agrees to execute a lease upon the proposed lessee, for the agreed consideration, and accepted by the latter, who also takes

¹ *Trask v. Vinson*, 20 Pick. 105,
110.

² *Condrey v. West*, 11 Ill. 146.

³ *Glascock v. Rand*, 14 Mis. 550.

⁴ *Cartwright v. Gardner*, 5 Cush.
273.

possession; it is no defence that the former refused to execute the lease. The remedy is on the agreement.¹

31. It is held, that a *partial* failure of title to land conveyed constitutes no defence to a note given in payment for it.²

32. The plaintiff, having a patent for land, sold the land to the defendant, giving him a bond for a good deed on payment of the purchase-money, for which the defendant gave his note. In an action on the note, the defendant relied upon an equity in A., by showing a receipt to A. from the land-office of money paid by him for the land. Held, the bond was a good and valuable consideration for the note, which was not impaired by the equity in A.³

33. Plaintiff and defendant entered into a written agreement, the latter to sell and the former to buy a tract of land for \$2,000, possession to be given on the 1st of May, when \$1,000 was to be paid. The land was under mortgage, but on the 1st of May a release of the mortgage was prepared to be delivered when the \$1,000 was paid. On the 15th of May, the plaintiff gave to the defendant his note for \$175 in part-payment of the purchase-money, which the defendant transferred, and the plaintiff was obliged to pay. The plaintiff brings this action to recover the money. Held, he could not recover.⁴

34. A. executed to B. a note for the price of land, on which C. had a mortgage. The note was to be paid by instalments, to meet the instalments on the mortgage. A. failed to pay the note, by which means B. was prevented from paying the mortgage. The mortgage was therefore foreclosed, and A. became the purchaser of the land, under the mortgage. Held, that A., by his own fault, had caused the failure to pay the mortgage, and therefore could not set up these facts as a defence to the note.⁵

35. In an action on a note for the purchase-money of

¹ *Moggridge v. Jones*, 14 E. 486; 3 Camp. Ca. 38.

² *Morrison v. Jewell*, 34 Maine, 146.

³ *Long v. Allen*, 2 Florida, 403.

⁴ *Garlock v. Lane*, 15 Barb. 359.

⁵ *Clark v. Condit*, 11 Mis. 79.

land, it is no defence for the grantee to set up a title which he has made by the purchase of a prior incumbrance, beyond the amount paid for such incumbrance; whether he purchased the incumbrance directly, or was substituted for the purchaser at a sheriff's sale; and the grantee may be enjoined by a Court of Equity from setting up such a title against the vendor, in an action at law on the note.¹

36. A., the owner of land, contracted verbally for the sale of it to B., and B. sold it to C., who received a conveyance from A., with general warranty, and executed his bonds to B. for a balance of the purchase-money. At the time of the sale, the lot was rendered more valuable by a change in a street, which street was afterwards restored to its original location by the town authorities. Held, that B., having made no representations to C., and not having been guilty of any fraud, and having made no warranty of title, was not liable to C. for any damage he had sustained; and that C. could not enjoin the collection of the purchase-money.²

37. The law of Mississippi gives the maker of a promissory note the benefit of all defences, of want of consideration, failure of consideration, payments, discounts, and set-offs, against an indorsee, which he had against the payee, previously to notice of the indorsement.³ But it is no defence, in an action on a note in the hands of a *bonâ fide* holder for value, without notice, that it was given for the purchase of the equitable title to land, from which the maker has been ejected by a judgment at law, he knowing at the time of the purchase that he bought but an equitable title.⁴ So the resale or rescission of a sale of lands is no defence to an action on a note for the purchase-money, brought by a *bonâ fide* holder of the note, who became such before the resale or rescission, and with the knowledge of the first purchaser.⁵ Neither is it a defence that the land has been sold

¹ Champlin v. Dotson, 13 S. & M. 553.

² Price v. Ayers, 10 Gratt. 575.

³ Brabston v. Gibson, 9 How. 263.

⁴ Green v. McDonald, 13 S. & M. 445.

⁵ Wiggins v. McGimpsey, 13 S. & M. 532.

under a judgment rendered prior to the sale, where the land had been reconveyed to the grantor, and the grantee knew his note to be in the hands of a *bonâ fide* holder.¹

38. On the sale of a plantation, in Louisiana, the vendor reserved the right of redemption, which right, according to the laws of Louisiana, may be exercised against a *bonâ fide* purchaser, without notice of the right. Notes were given for the purchase-money, payable in Mississippi, and secured by a mortgage of the plantation. These notes were afterwards indorsed in Mississippi, without the knowledge of the maker, as collateral security for a debt due from the payee to the indorsee. The vendor redeemed the plantation, and agreed to assume the outstanding notes, and gave the original vendee a mortgage on the plantation to secure their payment. Held, that these facts constituted no defence, under the statute of Mississippi, to a suit brought in Louisiana on the notes by the indorsee against the maker. So, although the notes were indorsed "*ne varietur*" by the notary, at the time of the original sale of the plantation.²

39. The question has often arisen, whether, in an action upon a promissory note, given for the purchase-money of land, which is conveyed by deed with *covenants of warranty*; the maker of such note may set up as a defence, in whole or in part, the breach of those covenants; and also whether this may be done, only after an eviction or disturbance by virtue of an adverse title to which such covenants apply, or simply by showing the existence of the adverse title. Upon this subject the decisions in different States have been somewhat diverse.

40. By the Supreme Court of the United States it has been held, that, where a promissory note was given for the purchase of real property, the failure of consideration through defect of title must be *total*, in order to constitute a good defence to an action on the note. And it was doubted,

¹ *Wiggins v. McGimpsey*, 13 S. & M. 532.

² *Brabston v. Gibson*, 9 How. 263.

whether, after receiving a deed, the party could avail himself even of a total failure of consideration. But, where the note is given with full knowledge of the extent of the incumbrance, and the party thus consents to receive the title, its defect is no legal bar to an action on the note. And any *partial* defect, in the title or the deed, is not inquirable into by a Court of Law, in an action on the note; but the party must seek relief in Chancery.¹

41. In Massachusetts it has been doubted whether, in an action by the promisee upon a *negotiable* promissory note, given for the purchase-money of land conveyed by warranty deed, it is competent to set up, by way of defence, a total want of title in the grantor at the time of the conveyance, and an eviction of the grantee. But, where the promisee had died insolvent, and the action was brought by the administrator of an indorsee, who, at the time of the indorsement, had notice that the title was questioned; such defence was allowed under the general issue, since the defendant could not plead the demand on the covenants by way of set-off, nor avail himself of it in a cross action; and in such case the plaintiff may introduce evidence, that the value of the land, at the time of eviction, was less than the amount of the note.²

42. In Maine it has been held, in an action by the payee upon a note given for land conveyed by warranty deed, that it is not competent to set up a partial or total failure of title, or a want of title, in the grantor, at the time of the conveyance. And, where the deed contained an express condition, that, upon breach of any covenant therein, the damages might be payable by cash to the amount received in money, and the residue by delivering up such of the notes as should remain unpaid; in an action upon one of such notes, some having been paid, the defendant was not permitted to show a breach in the covenant of seizin as to part of the land, to the value of the note declared on.³

¹ Greenleaf v. Cook, 2 Wheat. 13.

³ Lloyd v. Jewell, 1 Greenl. 352.

² Knapp v. Lee, 3 Pick. 452.

43. Action upon a promissory note, given as the consideration of land conveyed with the usual covenants of seizin, of warranty, and against incumbrances. At the time of the conveyance there was an attachment upon the land; afterwards judgment was rendered in the suit, and the execution levied upon the whole of the land conveyed. The grantee did not redeem, but suffered a title to be acquired under the levy; but it was not shown that the land was appraised at its full value, nor that the grantee had not received rents and profits. Held, a total failure of consideration for the note was not shown. And a partial failure of title would not, it seems, constitute a defence *pro tanto*.¹

44. In a still later case, it is said not to have been authoritatively settled, that a total want of title will not be a good defence to such note, except in the hands of an innocent indorsee. But, where the conveyance is by deed with covenants of warranty, the defect of title must be entire, so that nothing valuable passes by the conveyance. Otherwise it becomes a case of unliquidated damages, and the remedy is by an action of covenant broken.² (a)

45. In New Hampshire, in case of a warranty deed, a partial failure of title will not constitute a defence to the note, but the remedy must be by suit on the covenants.³

46. In New York, a plea of want of seizin, in a vendor who has conveyed with a covenant of seizin, is no bar to an action of debt on a bond given for the purchase-money. Where the purchaser has acquired any estate or interest whatever, or obtained any benefit by the conveyance, he cannot plead want of seizin; but must, with his plea, give notice

¹ *Wentworth v. Goodwin*, 21 Maine, 150.

² *Jenness v. Parker*, 24 Maine, 289.

³ *Chase v. Weston*, 12 N. H. 413.

(a) In case of a conveyance by deed of *release and quitclaim*, without covenants, it is not a good defence, that the plaintiff represented his title to be in fee-simple, when it was but an estate for life or for years; nothing short of a total failure of title being in such case a sufficient defence. *Howard v. Witham*, 2 Greenl. 390.

of the facts he relies upon, to reduce the amount of the recovery as for a partial failure of consideration. Where there has been an eviction, and the purchaser is liable to the true owner for mesne profits, to an amount equal to the sum demanded of him by his vendor, he may plead such facts in bar of the action, as showing a total failure of consideration; but it is doubted whether a total or partial failure of consideration by reason of defect of title can be shown where the conveyance was with warranty, and there has not been an eviction. And the general doctrine is laid down, that, where a sale has been consummated by a deed, without fraud or deceit, the purchaser cannot by his own act repudiate the contract; he must apply to chancery; and even that Court will not in general interfere, if there be covenants in the deed.¹

47. In Mississippi, there must be a total failure of consideration, and an actual eviction, or what is equivalent thereto, to enable the maker of a note, given for the purchase-money of land, who is in possession under a deed containing a general covenant of warranty, to avail himself of the failure of his title as a defence to an action at law upon the note.² In Alabama, neither fraud nor failure of consideration is a good defence at law to a note given for the purchase-money of land, when the vendee has accepted from the vendor a deed with covenant of warranty.³ In Indiana, the existence of incumbrances upon land, conveyed with a covenant against incumbrances, is no defence to a suit on a note given for the purchase-money, unless the purchaser has been evicted or has paid money to remove the incumbrance.⁴ Thus to an action upon such note, it was pleaded in bar, that the land was conveyed with a warranty against incumbrances; that it was then subject to unpaid taxes, unknown to the grantee; and had since been sold therefor and a certificate given to the purchaser. Held, the plea was bad, as showing no eviction, nor that the land might not be redeemed.⁵ But,

¹ Tallmade v. Wallis, 25 Wend. 107.

² Glenn v. Thistle, 23 Miss. 42.

³ Patton v. England, 15 Ala. 69.

⁴ Clark v. Snelling, 1 Cart. 382.

⁵ Streeter v. Henley, 1 Cart. 401.

in Illinois, in an action on a note, a breach of covenant of warranty in a deed of land, for the price of which the note was given, is a sufficient defence.¹ (a)

¹ *Slack v. McLagan*, 15 Ill. 242.

(a) In connection with the subject of *covenants*, treated in the text, it may be added, that, in a *scire facias* suit upon a *mortgage*, the mortgagor may show in defence an eviction from part of the mortgaged premises by a paramount title. *Steinhauer v. Witman*, 1 S. & R. 447. See *Hilliard on Mortgages*, ch. 20.

So, where land is conveyed with covenant of warranty, and the purchasers are evicted from part of the premises, or a judgment in ejectment is recovered against them; on a bill in equity by the vendor for foreclosure of a mortgage given for a part of the purchase-money, the purchasers, or those claiming under them, may avail themselves of the failure of title as a defence, and the Court will either stay the proceedings, until the damages are ascertained by a suit at law, or will direct an issue, or a reference to a master, to ascertain the damages, before decreeing a recovery upon the mortgage. As a general rule, it will be referred to a master to ascertain the damages, unless the complainant requires a trial at law. *Coster v. Monroe*, &c. 1 Green, Ch. 467.

A. sold to B. a plantation of six hundred and thirty acres of land, with covenants of warranty, together with certain personal property, and the growing crop, for a gross amount, for which B. gave his notes payable in instalments. A. represented his title to be good, knowing it to be defective. There was an outstanding title to five hundred and seventy acres of the land, the owners of which obtained possession after the purchase. Held, equity would grant relief, and decree a rescission of the contract, after judgment on the notes given for the purchase-money. *Parham v. Randolph*, 4 How. (Miss.) 435.

But an assignee of a covenant contained in a warranty deed is not affected by any equities existing between the original parties. Thus, where premises were conveyed subject to a mortgage, and it was agreed, at the time of the conveyance, that the grantee should assume payment of the mortgage, and pay to the grantor only the difference between the amount thereof and the consideration of the conveyance, and that the covenants of warranty and for quiet enjoyment should not extend to the mortgage; held, such agreement could not be set up in bar to an action brought by the assignee of the covenantee, who was evicted under the mortgage. *Snydam v. Jones*, 10 Wend. 180, 184.

So a defence to a bill for foreclosure was denied, because the party merely alleged an outstanding title. *Van Waggoner v. McEwen*, 1 Green, Ch. 412.

Conveyance to the president of an incorporated company and his successors in trust for the stockholders. The president, under a power from the stockholders, conveyed and delivered possession to the defendant, having notice of his title, and took notes for the price, secured by mortgage of the property. In a bill to foreclose, brought by an assignee of one of the notes, the mortgagor sought to defend, upon the ground that the deed to the president was void, but did not allege any fraud or mistake. There had been no eviction. Held, no defence to the suit. *Natchez v. Minor*, 9 Sm. & M. 544.

Conveyance with warranty, and a bond and mortgage back to secure the price. The mortgagor brings a bill in equity for an injunction of a suit at law, upon the ground of a failure of consideration of these securities, consisting in a want of title in the mortgagee. It appeared, that the plaintiff had taken possession and never been evicted; that the securities had been assigned, for value; and that the plaintiff, in consideration of forbearance, gave the assignee a new bond and mortgage, the latter having no notice of any fraud or failure of consideration in the original transaction. Held, the bill could not be maintained. *Bumpus v. Platner*, 1 Johns. Ch. 213.

Where, in a sale of land, although with covenants of warranty, there has been fraud on the part of the vendor, consisting either of misrepresentation or concealment, the vendee may go into equity for relief. So, though the outstanding title was on record. So, it seems, though there has been no eviction. But, if the contract is entire, and there is a failure of title as to a part of the land, which is essential to the perfect enjoyment of the remainder, in the manner contemplated by the purchaser, Chancery will rescind the contract. It seems, this is the proper remedy. *Parham v. Randolph*, 4 How. (Miss.) 435.

In connection with the subjects of this chapter, the following cases illustrate in several particulars the power and action of a *Court of Equity*:—

A. made an agreement for the sale of lands with B. and C., took the notes of the latter, with D. and E. as sureties, and gave his bond, conditioned to make titles, when the notes were paid. B. and C. assigned the bond to D. and E., to indemnify them for becoming sureties. A. dying, and D. and E. being in possession of the lands, and D., exercising a control over them, D. paid the last note due, after suit, and took from A.'s representatives and heirs a bond, conditioned for the executing of a title to D. within a specified time. On the expiration of this time, D. brought his action upon the bond, and the present bill was filed by A.'s representatives for specific performance. Held, the administrator was entitled to a specific execution of the contract of his intestate, and the heirs might well become parties to the suit; that the bond, executed by the plaintiffs, was without consideration and void; that the plaintiffs, in bringing this suit, had a right to make the bond a part of the case, and, in decreeing a specific execution, Chancery

could decree also a cancellation of the bond; that it was a just excuse for delay to file this bill, that the party holding the bond of the intestate might have applied to the Orphans' Court, and there perfected a title; that the assignment of the bond to the sureties created an equitable mortgage of the lands in favor of the latter, which might be foreclosed; and that it was essential to make all the heirs of the vendor, and of the assignee of the vendees, parties to the cause, before a decree could be rendered; but that all the amendments for this purpose could be made on remanding the case to the Court below, on a mandate from the higher Court. *Hays v. Hail*, 4 Port. Eq. 374.

A purchaser with notice of an adversary claim to part of the land, not asking rescission, shall not have compensation for the part lost. *Morrison v. Caldwell*, 5 Monr. 439.

So, where a purchaser with warranty had full notice of the adverse claims to the property, he cannot have rescission, because the warrantor becomes insolvent, and he fears a loss of the land. Where a part of the land is lost, and the warrantor insolvent, the purchaser may have compensation, by injunction against a judgment for the balance of the purchase-money. But, if he had notice of the adverse claim before his purchase, he cannot have an injunction, and the cause delayed, till the adverse claim be tried in another Court. A purchaser may have an injunction against a judgment for a balance of the purchase-money, for the damages caused by breach of warranty, the warrantor being insolvent; although recovered by a *bonâ fide* assignee of the obligation, without notice. *Rawlins v. Timberlake*, 6 Monr. 230.

Upon the ground that a Court of Equity, in Massachusetts, has no power to decree specific performance of a contract, unless every part of it has been reduced to writing; where the defendant contracted in writing to execute and deliver a deed of land, upon payment of certain notes given for the purchase-money, and made a subsequent verbal promise, to deliver the deed upon payment of the notes before they should fall due; it was held, that a bill in equity against him for specific performance of the contract, as modified by the verbal agreement, could not be sustained. *Brooks v. Wheelock*, 11 Pick. 439, 440.

The following cases further illustrate the rights and duties of the respective parties, in connection with notes given for the purchase-money of land sold, and the payment of such notes:—

For the first payment under a contract for the purchase and sale of land, the vendee drew a bill of exchange, payable at the time when a conveyance of the land was agreed to be made, which was dishonored at maturity, and the vendee was then insolvent. Held, that the vendor might rescind the contract, and refuse to convey; and, having done so, his administrator could not revive it. *Todd v. Caldwell*, 10 Texas, 236.

A. agreed with B., that, in consideration of a certain sum, he would convey to B. a certain tract of land, and the purchase-money was secured by notes, payable in three years. It was further agreed, that B. should take possession, and pay annually, for three years, a certain portion of the crop; if B. thus paid for the land in three years, the deed was to be given; if not, the annual payment was to be considered as rent, and, at the end of the three years, the land to be surrendered by B. Held, if the annual payments amounted at the expiration of four years to the price agreed, the bargainee claiming that they should be so applied, although the bargainor insisted that they should be considered only as rent, the bargainee was entitled to a conveyance. *Wells v. Wells*, 3 Ired. Ch. 596.

Upon the general subject of the rights and duties of the parties in reference to title, it may be here added, that, while *the vendee* may set up the vendor's want of title, in defence against a claim for specific performance or for the purchase-money; it has been held, that *a vendor* cannot exempt himself from his obligation and agreement to convey, on the ground that he has not the legal title. It is said, a vendor *has no interest* in setting up his own want of title. *Jones v. Belt*, 2 Gill, 106.

It has been held, that a *bonâ fide* vendor, believing he has title, covenanting to convey, and discovering, before any part of the consideration is paid, a defect in his title, is not liable to damages for refusing to convey. Otherwise, if he acts *malâ fide*, and refuses to convey because the property has increased in value. *Baldwin v. Munn*, 2 Wend. 399; *Bitner v. Brough*, 11 Penn. 127.

CHAPTER XXXII.

MUTUAL AND CONDITIONAL RIGHTS OF VENDOR AND VENDEE.
WHEN WAIVED OR DISPENSED WITH.

1. ALTHOUGH the respective obligations in a contract of sale and purchase may themselves be dependent and conditional; yet the parties by their conduct may *waive* the conditions provided for their protection and benefit. Thus an outstanding mortgage upon lands conveyed, possession having been taken by the grantee, is no bar to an action for the purchase-money, unless fraud be shown.¹ So money paid under an agreement for a lease cannot be recovered back, on the ground that the lease tendered contained covenants on the part of the lessee to cleanse the drains and vaults, and not to assign or underlet, or make alterations without consent of the lessor; if the lessor at the time of tender requested the lessee to specify his objections to the lease, but he refused to do so.² So, if before the period fixed for delivery of a deed the vendee has declared that he would not receive it, and that he intended to abandon the contract, it may render a tender of the deed before the institution of a suit unnecessary. Otherwise, with a subsequent declaration.³

2. So a *substantial* performance by the vendor in making a good title will be sufficient to bind the vendee. (See Chap. 3.)

3. Sale of land, and a house to be erected thereon. Declaration, that on a certain day the house was finished, and the plaintiff tendered the key to the defendant, and offered to

¹ Oldfield v. Stevenson, 1 Cart. 153.

³ Bank, &c. v. Hagner, 7 Pet. 455.

² Sargent v. Adams, 3 Gray, 72.

deliver to him a good and sufficient deed with warranty, duly acknowledged, conveying the fee free of incumbrances, and to make a good and sufficient title; and was ready, able, and desirous to do so, but that the defendant refused to accept such conveyance and title. Plea, that the plaintiff had not a clear title, but that, having mortgaged the house to A., he had conveyed the equity of redemption to B. Replication, that B., by a bond of even date with the deed to him, had covenanted to reconvey to the plaintiff, and that he was willing and offered to do so whenever the defendant would accept the plaintiff's deed. Held, that the declaration and replication were sufficient.¹

4. A party has no remedy in Equity on the mere ground of a failure of title, if he has taken no covenants to secure the title, and there is no fraud. The defendants, G. and W., the one by the purchase of a mortgage, and the other by the purchase of the equity of redemption, became possessed of the whole estate, and leased it to the plaintiff. G. afterwards assigned the mortgage, with notice of the term. Held, the assignment was not a fraud on the plaintiff; and, though the property was afterwards sold, on a bill for foreclosure filed by the assignee, and the term thereby merged in the inheritance; yet, as the plaintiff himself became the purchaser, he thereby waived all right, if any he had, to relief for the damages sustained by the loss of his term; that the fraud, in such cases, which will entitle a party to relief, is a fraud at the time of the execution of the deed or lease to the plaintiff, and not fraud in a subsequent and distinct transaction; and that the possession of a tenant is notice to a purchaser of the reversion of the actual interest of the tenant, and of the extent of that interest; and the purchaser is bound to admit every claim of the tenant, which he could enforce against the vendor.²

5. But the rights of a party will not be held to have been

¹ *Howland v. Leach*, 11 Pick. 154; *Fleming v. Gilbert*, 3 Johns. 530.

² *Chesterman v. Gardner*, 5 Johns. Ch. 29.

waived, unless the circumstances strictly require such construction of his acts. Thus an offer by a purchaser, after examining a title which proves defective, to take the land if he may pay in notes of other parties, not accepted by the vendor; constitutes no waiver of his right to refuse a deed.¹ So, whether the purchaser has been in the occupation of the premises at all, or whether he was in possession up to the time of the trial, is immaterial, and cannot affect his right to sustain an action, upon breach of the contract; and such a breach occurs when the vendor, upon request, refuses to convey.² So a vendee is not bound to restore possession and give up the contract, before he can object to the title, in an action for the purchase-money. He cannot keep both the estate and the price; but it is the vendor's business, if he finds that he cannot make such a title as the vendee is bound to accept, to refund what has been paid, and bring an ejectment for the property.³ So, although the taking possession of property by the vendee, before conveyance, is a circumstance from which it is to be inferred that he considered the contract closed, it would not deprive him of the right to relinquish the property, if the vendor could not or did not make a title; and then to recover back the purchase-money.⁴ So a bill by a vendor for specific performance, the report being against the title, was dismissed with costs, upon the circumstances; the purchaser having taken possession at the instance of the vendor, representing the title to be perfect.⁵

6. A vendor covenanted to convey the land, which was to be surveyed, free of incumbrances, by the 1st of January. The land not being surveyed in time, the vendee verbally declared that he would take no advantage, on account of the vendor's not conveying on the day. The land was some months afterwards surveyed, but the vendee refused to accept a conveyance, because it was incumbered. Held; the

¹ *Mead v. Fox*, 6 Cush. 199.

² *Fletcher v. Button*, 6 Barb. 646.

³ *Gans v. Renshaw*, 2 Barr. 34.

⁴ *Bank, &c. v. Hagner*, 1 Pet. 455.

⁵ *Vancouver v. Bliss*, 11 Ves. 458.

vendee, by enlarging the time, did not waive his right to recover a sum which was fixed and liquidated by the agreement, as the amount of damages to be paid by the party failing in performance, even admitting that his consent to extend the time amounted to an agreement; for such subsequent agreement, by parol, was void by the Statute of Frauds, and could not alter, revoke, or modify, the previous valid contract.¹

7. And the same strict rule is applied in favor of the vendor. Thus a vendor covenanted to convey within two years, and the vendees to pay on receiving the conveyance. The latter took immediate possession, pursuant to another covenant on the part of the vendor; and, by an arrangement between the parties and one A., part of the premises were conveyed to the vendees by A., within the two years, A. having title; but the time had elapsed when the conveyance for the residue was tendered; and for that reason the vendees refused to receive the conveyance. Held, the contract was not rescinded, and the vendees were liable in *indebitatus assumpsit* for the consideration-money, not having redelivered possession, and rescinded *in toto*.²

8. Contract to sell and buy land for a specified sum. The title to a part failed, from a cause of which both parties were ignorant. Held, a sufficient reason for rescinding the whole contract, but that the vendee could not insist that it should be partially rescinded; and, if he declined to rescind, he must pay the whole price.³

¹ Hasbrouck v. Tappen, 15 Johns. 200.

² Gale v. Nixon, 6 Cow. 445.

³ Bailey v. James, 11 Gratt. 468. See Shirley v. Shirley, 7 Blackf. 452.

CHAPTER XXXIII.

ACTION FOR USE AND OCCUPATION, BETWEEN VENDOR AND
VENDEE.

1. WHERE the contract of sale and purchase fails to be completed, the question has often arisen, whether the vendee, having taken possession, is to be so far considered the *tenant* of the vendor, as to be liable in an action for *use and occupation*. Upon this point it has been held, that, when the vendee has thus entered, and fails to pay the purchase-money as agreed, the vendor may, at his election, either treat him as a tenant, and recover for use and occupation, or as a trespasser, and eject by suit; and in neither case is the vendee entitled to notice of his vendor's election, other than that given by the commencement of legal proceedings.¹ So if, after the contract is clearly abandoned, the purchaser retain possession, he will be liable as for use and occupation.² So, when the vendee enters into possession under a parol contract of purchase, by the terms of which he was to pay "\$500 down, and \$500 twelve months afterwards," and entirely fails to pay the purchase-money, and, after remaining in possession for more than twelve months, abandons the land; the vendor, if in no fault, may recover, in assumpsit for use and occupation, the value of the land during the time the vendee so held it.³

2. Action for use and occupation. The defendant sold land to A., and A. to the plaintiff, who took possession, but, pending a suit for specific performance by A. against the defendant, was induced by the defendant, under a mistake

¹ Seabury v. Stewart, 22 Ala. 207.

² Howard v. Shaw, 8 M. & W. 118.

³ Smith v. Wooding, 20 Ala. 324.

of facts, to surrender possession. A decree being rendered in favor of A., and a conveyance executed accordingly; held, the plaintiff might maintain this action for the time during which the defendant had resumed possession.¹

3. Verbal contract of purchase. The vendee entered and cultivated the land for two years, then quit, and renounced the contract; although the vendor at the same time offered to make a deed of the land, which the purchaser declined to accept. Held, the vendor might maintain an action for use and occupation for two years.²

4. The defendant made a verbal purchase of the plaintiff's house, advanced the purchase-money and took possession. Before any deed was given, the house was burned, but immediately afterwards a deed was tendered and refused, and the defendant quit possession of the ground, and brought an action for the purchase-money, in which he recovered judgment. The plaintiff then brings the present action for use and occupation. Held, the defendant was liable for the time he occupied the house, but not after refusing the deed. The possession being taken under the expectation of a conveyance, which in consequence of an unforeseen event never was or could be made; the defendant in the mean time was a tenant at will. Had the deed been actually made, the tenancy would have been merged in the executed contract, which by its terms would relate back to the time of taking possession. But, with regard to the subsequent period, by the destruction of the building, the purpose of the defendant to use and occupy the estate temporarily till the title should be completed, and then permanently, was wholly defeated. By his acts he showed his determination to terminate the tenancy, and therefore no longer remained liable as a tenant.³

5. S. and Co. agreed in writing with C., that, if he would build a shop on land held by him under a five years' lease

¹ *Hull v. Vaughan*, 6 Price, 157.

² *Davidson v. Ernest*, 7 Ala. 817. In this case, Collier, C. J., examines at length the English and American cases,

and comes to the result stated in the text.

³ *Gould v. Thompson*, 4 Met. 224, 228, 229.

from the owner thereof, and would assign to them his interest in certain underleases of parts of the same land made by him for the same term, which leases had been assigned by the lessees to S. and Co., and if S. and Co. should be permitted to occupy the land, without paying rent, for three years, they would then reassign the underleases to C. A few months after the making of this agreement, and after S. and Co. had entered upon the land, a difference respecting the land and the buildings thereon arose between the parties, who thereupon agreed that such difference should be referred to arbitrators, and that all papers pertaining to the land should be committed to them, and that they should judge in the case, and report what in their judgment was just and right to be done between the parties, and fix the term of time for which S. and Co. should occupy the land as full compensation for what was their rightful due. The arbitrators awarded, that S. and Co. should occupy the premises, free of rent, for two years and six months from the time of their entry. Held, the agreement in writing was merged in the submission and award; but that S. and Co., if they occupied the premises after the expiration of the time named in the award, were liable to C. in assumpsit for use and occupation.¹ Shaw, C. J., says: "The effect of the submission and award was to supersede all previous agreements, leases, and dealings between the parties respecting the estate in question. By virtue of the award, the defendant had the right to occupy the premises for the term of two years and six months free of any claim of rent on the part of Coburn; after the expiration of this period, the defendants had no right to occupy the estate, as against Coburn and his assignee, except as tenants. Taking into view the previous relation of the parties, and all the facts as disclosed by the testimony, we are of opinion, that the defendants did so occupy the premises, after the expiration of the two years and six months, and are therefore liable to pay rent for the

¹ Knowles v. Shapleigh, 8 Cush. 333.

same for the time during which they occupied them after that term, until the time when the right of Coburn, under his lease from the proprietors of the locks and canals, to the estate in question expired, and that an action for use and occupation is the appropriate remedy."¹

6. The same principle has received other applications. Thus it is said, that, when the purchase is completed, the purchaser's title, even at law, so far relates back to the time fixed for completion, that he can maintain use and occupation against a person whom he has by mistake allowed to have the interim possession.²

7. So the rule has been applied to the vendor as well as the vendee. Thus, in *Hull v. Vaughan*,³ (see s. 8, n.) the defendant was a vendor of land, refused to execute his contract, obtained possession by misrepresentation, and retained it when the plaintiff was entitled to it. Mr. Baron Graham says: "It is not necessary in this species of action that the proper relation of landlord and tenant should be distinctly made out between the parties, because the action is calculated in form to meet cases where the parties do not bear those characters, if there be in point of fact an ownership on one hand, and an occupation on the other, and it should be liberally applied where it may be found to be a party's only remedy. My difficulty has been to reconcile that rule with the rule of *Kirtland v. Pounsett*, where the Chief Justice has certainly expressed himself very strongly against the implication of an assumpsit, where it was not in the contemplation of the parties. Although in raising an implied assumpsit, however, we may or may not be doing what was not in the contemplation of the parties at the moment, that should not be the only consideration with us in determining whether this species of action can be maintained or not."

8. This, however, has not been the uniform doctrine of the decided cases, either English or American. Thus, it has

¹ *Knowles v. Shapleigh*, 8 Cush. 336-7.

² Dart, 120.

³ 6 Price, 157.

been held, that, where a man agrees to purchase, on an assurance that the vendor has a long term, and, on the faith of such assurance, at considerable expense, enters into possession, he shall not, on refusing to complete his purchase, on account of the seller's having a shorter term, be charged in an action for use and occupation.¹ So in a leading and often cited case it was determined, that, if a purchaser takes possession, and the sale, on account of a defect in the vendor's title, fails to be completed; the vendor cannot recover rent upon an implied contract for use and occupation.² Mansfield, C. J., says: "If no money had been paid, perhaps it might be a different question; but if a man pays part of his money, and is so unwise as to tender possession without a title, is it not just that the one party should take back his money, and the other take back his house? It is impossible to make the rules of law depend on the balance of loss or gain in each transaction. The possession of a house is always beneficial; for it protects the occupier from the inclemency of the weather. A contract cannot arise by implication of law under circumstances the occurrence of which neither of the parties ever had in their contemplation."³

¹ *Hearn v. Tomlin*, Peake's Ca. 192.

³ *Ibid.* 196-7.

² *Kirtland v. Pounsett*, 2 Taunt. 145.*

* In the case of *Gould v. Thompson*, 4 Met. 227-8, Shaw, C. J., remarks as follows upon this case, in connection with a subsequent one, by which he considers it as to some extent overruled: "In *Kirtland v. Pounsett*, 2 Taunt. 145, it was argued by counsel, that there was no demise, express or implied, arising from such use of premises agreed to be sold, and of which the vendee takes possession under permission of the vendor. The cause, however, was not decided on that ground, but on the ground, that the use of the purchase-money, which had been advanced, was intended and must be presumed to be a compensation for the use and enjoyment of the premises. But in the subsequent case of *Hull v. Vaughan*, 6 Price, 157, where the foregoing case was reviewed, it was decided, on great consideration, overruling the direction of the Judge at Nisi Prius, that where the relation of landlord subsisted by any contract, express or implied by law, the action of assumpsit for use and occupation would lie; and that such contract would be implied from the actual occupation and enjoyment of the premises, by permission of the owner, or other person having the power of disposal, when such use and occupation had been beneficial." As to the distinction between *actual* and *constructive* occupation, see *Towne v. D'Heinrick*, 24 Eng. L. & Eq. 235. That one may be liable for use, &c., though not technically for *rent*, see *Smith v. Eldridge*, 26 Ib. 285.

9. A. sold land to B., and gave a bond to make title. B. filed a bill in equity, to compel a specific execution or a rescission of the contract. The contract was rescinded. A. sued B. in assumpsit for use and occupation. Held, that he could not maintain the action, but that he should have set off his claim for rents and profits in the suit in equity.¹

10. Agreement for the sale and purchase of land. The defendant, the purchaser, took possession, and afterwards refused to complete his purchase; whereupon the plaintiff brings this action for use and occupation. In considering the question whether the action was maintainable, the Court (in New York) said, that the statute of that State was substantially the same as the English act of Geo. II., and applies only to the case of a *demise*, and where there exists the relation of landlord and tenant, founded on some agreement creating that relation. The defendant entered under a color of title, which might have been enforced in equity; by refusing to perform his contract, he became a trespasser, liable to be turned out as such, and responsible in that character for the mesne profits, but not as a tenant.²

11. Bond dated May 30, 1835, conditioned, in consideration of \$500 and three notes for \$500, to convey a house and lot when all the conditions of the bond should be fulfilled. At the foot of the bond was a receipt for \$500. In 1841, the obligor signed a certificate that he had taken back the property for the same sum which the obligee "agreed for and purchased of him," and "feel myself bound for the same amount." The obligee took possession in 1835, and remained in possession till 1840; the rent being worth \$90 per annum. This action was brought upon the agreement of 1841, to recover the \$500. Held, the defendant was bound to return the amount paid him by the plaintiff under the contract of that year; that the value of the use and occupation was not to be deducted; and that the contract of 1841 was a repurchase.³

¹ Rogers v. Wiggs, 12 B. Mon. 504.

³ Benson v. Boteler, 2 Gill, 74.

² Smith v. Stewart, 6 Johns. 46.

12. Action for use and occupation. In May, 1838, the defendant contracted verbally with the plaintiff for the purchase of a farm for \$1,200; \$200 or \$300 to be paid when he should take possession; \$500 in the following summer; and the balance in two years. The defendant entered and paid \$200, for which the plaintiff gave a receipt, as in part payment. The defendant took the crops for 1838, but, failing to make any further payment, received notice to quit, and removed in December. The plaintiff then brings this action, and the defendant claims the \$200 by way of set-off. Held, the set-off could not be allowed, the defendant not having paid or tendered the instalment when it fell due; but, also, that the plaintiff could not recover without paying back the sum received under the contract.¹

13. In conformity with the cases last cited, it is said to have been recently determined, that a purchaser who has been let into possession, pending discussions as to title, cannot, if the contract go off through defects in title, be sued for use and occupation, even though the occupation may have been a beneficial one.²

14. The defendant paid the plaintiff's intestate \$100 as the price of land sold, and the intestate gave the defendant a negotiable note for the money, under which was written the following memorandum, signed by the intestate: "N. B. —This note is to be given up when I give him a deed of the land which I have engaged to give him," &c. The defendant occupied the land nine years till the intestate's death, but the latter made no conveyance of the land, and the defendant retained the note. The intestate dying insolvent, his administrators bring this action against the defendant for use and occupation during the nine years. Held, the action would not lie. Parker, C. J., says: "This case, if it must be determined for the plaintiff, would produce great injustice. There was certainly no expectation between the intestate

¹ Ayer v. Hawkes, 11 N. H. 148.

² Dart, 119; Winterbottom v. Ingham, 7 Q. B. 611.

and the defendant, that the defendant should pay rent for the land which he had agreed to purchase and had paid for. Indeed, we do not see why the note, with the memorandum, is not a sufficient agreement whereby in equity to compel a conveyance. The interest of the money received by the intestate was just equivalent to the sum charged for rent; the intestate therefore received his rent in his lifetime. It is true he gave his promissory note for the money he received, payable on demand and on interest, but it is manifest this was to be a mere memorandum between the parties. On the note itself it appears that it might be discharged at any time, by the delivery of the deed which had been agreed for; and though the note is negotiable in form, its negotiability to the prejudice of the intestate was destroyed by the written memorandum on it, which, though signed by the intestate alone, was binding on the defendant, he having received it in that form, and every assignee would have notice of the subsisting right to defeat the note.”¹

¹ Little v. Pearson, 7 Pick. 301, 303.

CHAPTER XXXIV.

MEASURE OF DAMAGES TO BE RECOVERED BY VENDOR AND
VENDEE.

1. AN important subject of inquiry, in connection with the respective remedies of the vendor and vendee of real estate, is the amount of *damages* to be recovered by each for a breach of the contract by the other. As has been seen, (Chap. 25,) the most effectual redress for the purchaser, and one specially favored by the law in reference to real estate, is *specific performance* of the contract, effected through a bill in equity. The same remedy may also be resorted to by the vendor; but, of course, differs less in this case than in the other from an action at law for damages; because pecuniary compensation, or the price or value of the property sold, is substantially the result alike of both these proceedings. It will be seen, that the measure of damages which may be recovered at law, either by vendor or vendee, is by no means well established. The great point of difference has been, whether the standard should be the price agreed upon, or the actual injury sustained by the plaintiff, in consequence of the defendant's violation of his contract. The grounds of these respective opinions will appear, in connection with a citation of the leading English and American cases upon the subject.

2. With regard to the claim of the *vendor* for damages, it has been held, that, where the purchaser has been let into possession, but does not complete the purchase, and refuses to pay the purchase-money, and no conveyance is executed, the vendor cannot recover from him the whole amount of the purchase-money, but only the damages actually sus-

tained by his breach of contract.¹ Thus, in case of a sale at auction, the difference between the price at which the land is first bid off, and the price at which it sold, at a subsequent and second sale, affords a good criterion of damages as evidence, although not binding upon the jury. But the second sale must have been conducted with fairness, and no means resorted to, to impair the value of the estate in public estimation. And, where the declaration does not aver, as part of the contract of sale, a condition, that the lands shall be resold in case of a failure on the part of the vendee to comply with the terms of sale, but simply alleges the difference between the two sales, and, as a consequence of a breach of contract, the liability of the defendant to pay the amount of that difference; and is framed on the supposition that the difference between the two sales is recoverable as on a contract, and not as unliquidated damages; it is bad on demurrer.²

3. On the other hand it has been held, that, where a party has bound himself to receive a deed of land, and to pay therefor a stipulated sum, and the deed has been tendered and refused, but has been placed in a position to await his call, the damages to be recovered, in a suit upon the obligation, are the contract price and interest. Tenney, J., says: "When a party, who has contracted in writing for the purchase of land, has done every thing on his part to entitle him to a conveyance, on a refusal of the other party, he can demand successfully specific performance. It is certainly reasonable, that the same right should be held by the one, who is to make the conveyance, and receive the consideration. In the latter case, when the deed has been tendered and refused, and now awaits the call of those who covenanted to accept it, it is just that the latter should be compelled in a suit at law, when damages alone can be awarded, to pay the price, which he had contracted to give, as the damages sustained by him who had in good faith fulfilled

¹ Laird v. Pim, 7 Mees. & W. 474.

² Adams v. M'Millan, 7 Port. 73.

the contract on his part, together with interest thereon.”¹ So, in the case of *Alna v. Plummer*,² the defendant bid off a farm at auction. A memorandum thereof was made by the auctioneer, and a deed properly executed was tendered to the purchaser, which he refused to receive. The damages awarded were the purchase-money and interest.³ (a)

4. The question, however, as to the measure and amount of damages, has for the most part arisen in actions brought by vendee against vendor. It will be seen, that the point has been variously determined in different cases, as affected by the analogy of covenants for title in executed conveyances, (b) or of contracts for the sale of personal prop-

¹ *Oatman v. Walker*, 33 Maine, 67, 73, 74.

² 4 Greenl. 258; acc. *Robinson v. Heard*, 15 Maine, 296.

(a) If a grantee of land, who has agreed with his grantor, in part of the consideration of the conveyance, to assume and pay the taxes which might thereafter be assessed on the land as of the 1st day of May previous, refuses to pay the taxes when assessed, and brings an action against his grantor on the covenant against incumbrances in the deed, the grantor may sue the grantee in assumpsit immediately for the breach of his agreement to pay the taxes, and, on paying the taxes before trial, may recover as part of his damages the amount so paid. *Preble v. Baldwin*, 6 Cush. 549.

The question as to the amount of damages to be recovered has also been raised as between the vendor and a party employed by him to effect a sale of the estate.

A. and B., land agents, were severally employed to sell an estate for C. D. called on A. to inquire after another estate, and was told that it was not in the market, but that C.'s estate was to be sold. D. took from A. a particular of the estate, and afterwards meeting B., the other agent, negotiated with him the terms of the purchase, which was afterwards completed. A. brought an action against C. for commission on the sale, which was proved to be, according to usage, £2 per cent., and payable to the agent who found the purchaser. Held, 1st, that the question for the jury was, whether they thought that in fact A. had found the purchaser; and 2dly, that, if they thought he had, and gave their verdict for him, they were not bound to give him the full amount of the commission, though the fact of that commission being usually paid was some evidence to guide them in their decision. *Murray v. Currie*, 7 Carr. & P. 584.

(b) The following is a concise statement of the law upon this subject:—

erty; (a) by the fair or fraudulent intent of the party; by the possession of the vendee under the contract; and by the

"The amount of damages to be recovered depends upon the covenant which is broken, and the manner in which a breach takes place. It seems to be the universal rule, subject to be varied only by special circumstances, that, upon the covenants of seizin, &c., the measure of damages is the consideration paid, with interest. No estate having ever passed to the grantee, the value of the land does not come at all in question. As to the amount of damages upon the covenants of warranty, &c., the rule is variously settled in different States. In general, it is the consideration paid, with interest. But in Massachusetts, Connecticut, and Maine, and formerly in South Carolina (though the rule is now changed) the value of the land at the time of eviction, with interest. In Pennsylvania, the price paid, with interest from the time of ceasing to receive the profits. In Ohio, the rule of damages on a covenant of warranty, is the actual loss sustained, to be ascertained under the occupying claimant law." 2 Hill. on R. P. (3d ed.) 406-7 and n. See *Blossom v. Knox*, 3 Chandel. 295; *Rich v. Johnson*, 1 Chandel. 19; *Griffin v. Reynolds*, 17 How. 609.

(a) It is said, "In all cases of executory contracts, the compensation in case of failure, when the property sold has in the meantime increased in value, should be the same as in case of an executed contract with warranty, and an eviction, for the real loss to the purchaser is the same." Per Green, J., *Stout v. Jackson*, 2 Rand. 132.

So, in a subsequent case in the same Court, it was remarked: "In all executory contracts for the delivery of personal property at a future day, the established standard of damages is the value of the property at the time and place when and where it ought to be delivered. In all executory contracts for the conveyance of land at a future time, the established measure of damages is the purchase-money." Per Cabell, J., *Threlkeld v. Fitzhugh*, 2 Leigh, 451.

It seems to be well settled, that the measure of damages, to be recovered by a purchaser of personal property, for a failure to deliver the thing sold at the time appointed, is the difference between the contract price, and the market price at that time, or that for which the vendee had sold; but the latter cannot recover, as special damage, the loss of anticipated profits to be made by his vendees. *Peterson v. Ayre*, 24 Eng. L. & Eq. 382; *McKnight v. Dunlop*, 1 Seld. 537.

And the same rule has been applied to an *exchange*. Thus, in a suit for breach of a contract to pay a certain quantity of flour for a certain quantity of wheat, the value of the flour is the measure of damages. *Lucas v. Heaton*, 1 Cart. 264.

considerations of public policy which demand a rigid fulfilment of contracts on the one hand, and that the party injured should be placed in as favorable condition as if the contract had been fulfilled, on the other.

5. The prevailing doctrine upon this subject is, that, on a covenant to convey real estate, as on a covenant of seizin in a conveyance, the measure of damages, in the absence of fraud, is the purchase-money and interest; not the present value of the land.¹ Thus, where the vendor has been unable to perform in consequence of a defect in his title, the rule of damages is the same, as in an action on the covenants as to title in a deed; and the plaintiff can only recover for such part of the consideration as he may have paid, with interest; not the expenses of taking possession, or of commencing the cultivation of the land, though he entered pursuant to the terms of the contract.² Bronson, C. J., remarks, that the measure of damages, in an action

¹ Blackwell v. Lawrence Co. 2 Blackf. 3 Bibb, 317; Cox v. Strode, 2 Bibb, 143; Sheets v. Andrews, 1 Ib. 274; Allen v. Anderson, 2 Bibb, 415; Dunnica v. Sharp, 7 Mis. 71; Kelly v. Bradford, 550.

The following remarks, in a late case in Massachusetts, refer to the question not unfrequently raised, how far the vendee may be allowed to include *remote and contingent profits*, as going to make up the *value* of the property sold: "The rule has not been uniform or very clearly settled as to the right of a party to claim a loss of profits as a part of the damages for breach of a special contract. But we think there is a distinction by which all questions of this sort can be easily tested. If the profits are such as would have accrued and grown out of the contract itself, as the direct and immediate results of its fulfilment, then, they would form a just and proper item of damages to be recovered against the delinquent party upon a breach of the agreement. These are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into. But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit." Per Bigelow, J., Fox v. Harding, 7 Cush. 522.

upon the covenants of seizin and for quiet enjoyment, is the consideration paid, with interest for such time as the vendee may be compelled to pay for mesne profits, and the costs of the suit by which he was evicted. He can recover nothing for increased value or improvements.¹ And the measure of damages is the same in case of a mere contract to sell, which fails solely for want of title, without fraud. In such case, the vendee can recover nothing for the loss of a good bargain. Nor for his expenses in removing to the land, or improvements. More especially if he has not acted with sufficient caution. The learned Judge proceeds to remark, upon cases apparently conflicting, that in *Hopkins v. Grazebrook*² (see p. 115) the defendant sold, having no color of title. In *Driggs v. Dwight*,³ he perversely refused to perform his contract, when there was no obstacle in the way. So in *Nurse v. Barns*.⁴

6. So it has been held, that, where the covenantee has been put in possession and never evicted, and the breach consists in the failure of the covenantor to convey, and in his not having the legal title in himself, and no fraud is proved or imputed, the covenantee is not entitled to more damages, at the utmost, than the purchase-money he has actually paid, with interest for the time for which he may be accountable for the profits to the true owner. Parker, J., says: "The vendee's loss, in case of failure, is the purchase-money; the profits, as long as he receives them, standing in lieu of interest, unless so far as they are recovered. For this loss he ought to be compensated, if the land falls in value; and no more than compensated, if it rises. Such a rule offers no temptation to the vendor to violate his contract; because, if he has a good title, the vendee can claim specific performance in a Court of Chancery."⁵

7. So it is held, that the measure of damages for a failure to convey is the consideration with interest, not in all cases

¹ *Staats v. Ten Eyck*, 3 Caines, 111; *Pitcher v. Livingston*, 4 Johns. 1; *Kinney v. Watts*, 14 Wend. 38; *Kelly v. Dutch Church*, 2 Hill, 115.

² 6 B. & C. 31.

³ 17 Wend. 71.

⁴ *T. Ray*, 77.

⁵ *Thompson v. Guthrie*, 9 Leigh, 101,

from the date of the covenant, but from the time when the money was payable without interest, or began to bear interest; and, if the covenant does not show that, it may be shown by proof *aliunde*.¹

8. So, in an action brought by the vendee for a breach of the covenant to convey, the purchase-money having been fully paid before or at the execution of the covenant, the plaintiff is entitled to recover the amount paid with interest, for a period not to exceed six years.² (a)

9. So, in a leading case upon this subject,³ often referred to and commented on in subsequent decisions, it was held, that, where the title proves (without collusion) defective, the purchaser is entitled to no satisfaction for *the loss of his bargain*. In that case, the vendor, the defendant, was the owner of the estate, but, the title being objectionable, he offered the vendee, the plaintiff, his election, either to take it as it was, or receive back his deposit with interest and costs. And it was held, this offer being refused, that the plaintiff could recover no more than that amount.

10. There is a class of cases, however, in which it has been held, that the measure of damages in an action of this description is not the price paid, or the loss suffered by the plaintiff, upon the supposition that this price precisely

¹ Herndon v. Venable, 7 Dana, 371.

³ Flureau v. Thornhill, 2 Black. 1078.

² Fletcher v. Button, 6 Barb. 646.

(a) In this case it was suggested, that perhaps a more stringent rule might be adopted, and the plaintiff be allowed to recover the value of the land at the time of the refusal to convey, with interest from that time. Fletcher v. Button, 6 Barb. 647.

Allen, J., in the course of an elaborate examination of the decided cases, remarks: "Although it has been often held, that the vendee cannot recover the purchase-money as such, while he remains in possession and fails to restore the vendor to his situation before the sale; the distinction has been made, that an action will lie to recover damages for breach of the covenant to convey, although the plaintiff is still in possession. Nor will he be confined to mere nominal damages, because the contract is one for the *title* to, not mere *possession* of, the premises."

equalled the value of the land; but the injury sustained by him in consequence of the defendant's breach of contract; or the value of the land without reference to the price, where the latter has been paid; and, if not paid, the excess of such value over the price. As has been already stated, this is the rule uniformly recognized, where the vendor has not acted in good faith; but it has by no means been always restricted by such a limitation. Thus it is said, with much force, in reference to the rule which makes *the price* to be the measure of damages: "Such a rule would tempt the vendor, in any case where the property increased in value, to violate his contract. The proper criterion is, the value of the *land* at the time when the title should have been made." And this view is said to be fortified by the consideration, that the vendee may demand specific performance, if the vendor has a title; or, if not, have a suitable allowance in Chancery for his improvements.¹ So it is said by the Supreme Court of the United States: "The rule is settled in this Court, that in an action by the vendee for a breach of contract on the part of the vendor, for not delivering the article, the measure of damages is its price at the time of the breach. The price being settled by the contract, which is generally the case, makes no difference, nor ought it to make any; otherwise the vendor, if the article have risen in value, would always have it in his power to discharge himself from his contract, and put the enhanced value in his own pocket. Nor can it make any difference in principle, whether the contract be for the sale of real or personal property, if the lands, as is the case here, have not been improved or built on. In both cases, the vendee is entitled to have the thing agreed for, at the contract price, and to sell it himself at its increased value. If it be withheld, the vendor ought to make good to him the difference. This is not an action for eviction, nor is the Court now prescribing the proper rule of damages in such a case."² So it is laid down, in general terms, that,

¹ Bryant v. Hambrick, 9 Geo. 134.

² Per Livingston, J., Hopkins v. Lee, 6 Wheat. 118.

in an action for breach of a covenant or agreement to convey real estate or a bond for title, the measure of damages is the value of the estate at the time of the breach; but that *interest*, as such, is not recoverable.¹

11. As has been already stated, the rule, in question has been sometimes restricted to cases of *fraud* on the part of the vendor. That fraud, however, may be merely *constructive*, and, as will be seen, has often been inferred from slight circumstances. The general rule, as thus qualified, has been laid down in a late case,² as follows: Where the vendor, without fraud on his part, is incompetent to make out a title, the vendee is not entitled to damages for the loss of his bargain, beyond the money paid, with interest and expenses, although the completion of the bargain might have been profitable to him. But where the vendor is guilty of collusion, tort, artifice, and fraud, to escape from a bad bargain, the vendee is entitled, not only to compensatory damages, but to damages arising from the loss of the bargain, or the money he might have derived from its completion. Rogers, J., says: "The distinction is, whether the vendor acts with good or bad faith. If the refusal of the wife to execute the deed is a mere pretext, the result of collusion at the instigation of the husband to rid himself of an improvident contract, the price having risen in the intermediate time between making the agreement and its completion, he must respond for the difference in value. Justice and good policy require this to be the rule, for otherwise the advantage would be entirely on the side of a vendor, who would be often under great temptation to violate his contract, when the difference in price was so great as to excite his cupidity."

¹ Shaw v. Wilkins, 8 Humph. 647; McKee v. Brandon, 2 Scam. 339; Buckmaster v. Grundy, 1 Scam. 310; Hopkins v. Yowell, 5 Yerg. 305; Hopkins v. Lee, 6 Wheat. 109; Cannell v. McClean, 6 Harr. & John. 297; Stephenson v. Harrison, 3 Litt. 170; Duncan v. Tanner, 2 J. J. Marsh. 399; Rutledge v. Lawrence, 1 A. K. Marsh. 396; Bryant v. Hambrick, 9 Geo. 133; Marshall v. Haney, 9 Gill, 251, 4 Md. 498; Whiteside v. Jennings, 19 Ala. 784.

² Bitner v. Brough, 11 Penn. 127, 139.

12. So, where a vendor knew that he could not make a title to the land, and the time when the contract was to have been performed did not appear; held, the value of the land at the time of swearing the jury should be the measure of damages.¹

13. So, in an action on an agreement to convey land, where the plaintiff had paid the consideration, and the defendant had fraudulently omitted in the deed of conveyance part of the land contracted for; it was held not to be error, that the Judge told the jury, that though, as a general rule, *the value of the property* was the measure of damages, yet they were not imperatively restricted to that standard, but might include in their verdict the necessary expenses of the plaintiff, if they deemed it prudent and reasonable to do so.²

14. So, in an action for the breach of a contract to *exchange* lands, the measure of damages is the difference in the value of the premises agreed to be exchanged, together with the expense of preparing the plaintiff's title papers, and the abstract tendered. And such damages may be recovered, though no special damage be alleged.³

15. A purchaser, before any conveyance to him, put up the estate for sale in lots by auction, and engaged to make a good title by a certain day, which he was unable to do for want of such conveyance. Held, a purchaser of certain lots might, in an action for not making a good title, recover not only the expenses which he had incurred, but also damages for the loss which he sustained by not having the contract carried into effect. The Judge, on the trial, told the jury they were not bound to confine their verdict to nominal damages, and a verdict was rendered for the plaintiff for £70, which the Court of King's Bench refused to disturb. Abbot, C. J., says: "If it is advanced as a general proposition that when a vendor cannot make a good title, the purchaser shall recover nothing more than nominal damages, I am by no

¹ McConnel v. Dunlap, Hard. 41.

³ Fagen v. Davison, 2 Duer, 153.

² Lee v. Dean, 3 Whart. 316.

means prepared to assent to it." Bayley, J., says: "Here the vendor had nothing but an equitable title. Now where a vendor holds out an estate as his own, the purchaser may presume that he has had a satisfactory title, and if he holds out as his own that which is not so, I think he may very fairly be compelled to pay the loss which the purchaser sustains by not having that for which he contracted."¹

16. It has been held, that, where the vendor, from inability to make a title, fails to complete the sale, the purchaser cannot recover, as damages, expenses incurred previously to the contract; nor the expense of a survey of the estate; nor of a conveyance; nor the extra costs of a Chancery suit, in which the vendor is defeated; nor losses sustained by the resale of stock prepared for the estate. But he is entitled to recover the expense of comparing deeds, searching for judgments, and of journeys for that purpose; and interest on his deposit money.²

17. While the measure of damages has in some cases been made to depend upon the *bona fides* of the vendor, the general rule of law, by which a party is not allowed to recover damages for a loss sustained even in part by his own fault or negligence, has been applied to a vendee who is thus chargeable.

18. The plaintiff having contracted with the defendant for the purchase of an estate, the defendant *bonâ fide* delivered an abstract, showing a good title; and the plaintiff, before he examined it with the original deeds, contracted to resell several portions of the property at a considerable profit. Upon a subsequent examination of the abstract with the deeds, the plaintiff discovered that the title was defective; and thereupon the sub-purchasers refused to complete their purchases, and he refused to complete his purchase from the defendant, and brought an action, wherein he claimed as damages the expense of investigating the title, the profit that would have accrued from the resale, the ex-

¹ Hopkins v. Grazebrook, 6 Barn. & Cress. 31, a very leading case.

² Hodges v. Litchfield, 1 Bing. N. S. 492.

pense attending the resale, and the sums which he was liable to pay to the sub-contractors for the expenses incurred by them in examining the title. Held, he was entitled to recover only the expenses that he had incurred in the investigation of the title, and nominal damages for the breach of contract, as no fraud could be imputed to the vendor. Bayley, J., says: "The plaintiff must show that the damages which he seeks to recover arose from the acts of the defendants, and not from his own haste. If the abstract had been examined with the deeds and found correct, the plaintiff might perhaps have been justified in acting on the faith of having the estate; and if after that time he had made a sub-contract, I think he would have been entitled to recover the expenses attending it if it failed in consequence of any defect in the title of his vendor. And, further, if there were *mala fides* in the original vendor, but not otherwise. I am not prepared to say that the purchaser might not recover the profit which would have arisen from the resale. But if premises for which a party has contracted are by him offered for resale too soon, that is at his own peril, and the damage, if any, resulting from such offer, arises from his own premature act, and not from the fault of his vendor. Here I think the plaintiff was premature, and therefore cannot recover."¹ (a)

¹ Walker v. Moore, 10 Barn. & Cress. 416, 421.

(a) The following miscellaneous points illustrate the subject of this chapter :—

Where a party agrees to demise certain premises to another, who breaks up his establishment, and proceeds with his family and furniture to the place where the premises are situate, and the landlord refuses to give possession, the tenant is entitled to recover the damages sustained by such removal, although special damage is not alleged. *Driggs v. Dwight*, 17 Wend. 71.*

* The tenant in such case is not bound to prove that he demanded a lease from the landlord, or tendered one executed by himself, especially if it be shown in addition to the refusal to give possession, that the landlord did not intend to perform the contract. *Ibid*.

Deficiency of quantity, if so great as to defeat the object of a purchase, is good cause for rescinding a contract for lands. And it may be set off in discount against the bonds given for the consideration. *Pringle v. Witten*, 1 Bay, 256. As where a mill-seat was the object of the purchase of a tract of land, and was taken away by an elder grant. *Gray v. Handkinson*, 1 Bay, 278.

Where a vendor omits to make out a good title within the stipulated time, and the vendee dies, his executor may sue for damage incurred by loss of interest on the deposit-money and the expense of investigating the title. *Orme v. Broughton*, 10 Bing. 533.

If specific execution of a contract to convey is decreed in favor of heirs; and the personal representative also recovers damages for the breach in failing to convey, the covenantor may be relieved from the double burden in equity. *Combs v. Tarlton*, 2 Dana, 464.

In an action upon a contract to convey, the plaintiff is restricted to the recovery of damages sustained prior to the commencement of the action. *Warner v. Bacon*, (Mass.) Law Rep. Nov. 1856, p. 406.

One who has been induced to purchase land of another and to pay him for it by the fraudulent representations of a third person, interested to effect such a sale, cannot in a Court of Equity recover the amount so paid of such third person, and require him to receive a conveyance of the land. *Woodman v. Freeman*, 29 Maine, 531.

Where the amount of the purchase-money to be reimbursed by the vendor, on account of a deficiency in the quantity of land agreed to be conveyed, is capable of being ascertained by computation, it is a proper case for a tender. *Walling v. Kinnard*, 10 Texas, 508.

The net sum only, without interest, can be recovered in an action for money had and received. *Walker v. Constable*, 1 Bos. & Pull. 306.

Lands of the defendant were put up by him at auction; of which one condition was, that the purchaser should pay a deposit and half the auction duty. The plaintiff purchased, and paid accordingly, and signed a written memorandum of the contract, which J. N., the auctioneer's clerk, also signed as follows: "Witness, J. N." J. N. received the above sums for M., the auctioneer, and signed the receipt (being authorized by M. to do so) as follows: "For Mr. M., J. N." Money was afterwards paid over by the auctioneer on the purchase to B., the defendant's attorney, as his agent. The defendant not being able to make out his title, B., as his agent, wrote a letter to the plaintiff's attorney, naming the plaintiff and defendant, saying that he could not make out the title to "this property as freehold," advising the plaintiff to "relinquish his purchase" and referring to the "charges" to be made by the plaintiff's attorney. Held, that J. N. did not sign the memorandum as agent to the defendant; that neither his agency nor the contract was recognized by the receipt of the money or B.'s letter; that

there was, consequently, no proof of a contract to make a title, on which the defendant could be charged under sect. 4 of the Statute of Frauds; and therefore, that, although the plaintiff might recover the deposit and moiety of auction duty as money had and received, he could not recover interest thereon, nor his expenses of investigating the title. *Gosbell v. Archer*, 2 Ad. & Ell. 500; 4 Nev. & Man. 485.

CHAPTER XXXV.

LIQUIDATED DAMAGES AND PENALTIES ; ARBITRATION ; DAMAGES
IN EQUITY.

1. THE amount of damages to be recovered by a vendor or purchaser of real estate is sometimes regulated, as in other contracts, by the express agreement of the parties, making their own appraisement or valuation of the injury which will be caused by a violation of the agreement. Damages thus mutually agreed upon are termed *liquidated* or *stipulated* damages, and can neither be increased nor diminished by an inquiry into the true amount of the loss sustained by the plaintiff in the action. The question, however, often arises, whether the sum mentioned in the contract is to be regarded in this light, or as a mere *penalty*, which, by a well-established rule of law, may be treated as only a *security* for the due performance of the agreement, leaving the question open as to the sum to be recovered, according to the circumstances of the case.

2. Upon this subject it is said: "The law will permit parties to determine by an agreement which enters into the contract, what shall be the damages which he who violates the contract shall pay to the other; but it does not always sanction or enforce the bargain they may make on this subject. Damages thus agreed upon beforehand, when sanctioned by the law, are called liquidated damages. Where the parties make this agreement, but not in such wise that the law adopts it, then the damages thus agreed upon are a penalty, or in the nature of a penalty. And the question whether damages agreed upon are to be treated as liquidated, or as in the nature of a penalty and therefore disre-

garded, often occurs, and is not always of easy or obvious solution.”¹ So it is said, for the purpose of determining this question, “the subject-matter of the contract may be inquired into, so far as respects the situation of the parties and the facts relating to the agreement; not, however, for the purpose of controlling the language, where that is clear and explicit, but to ascertain the circumstances out of which the contract originated, and especially in regard to the consideration.”² (a)

3. The defendant agreed to take an assignment of the plaintiff's house and premises, without requiring the lessor's title; that he would pay £2,300 for it, and also the amount of goods, fixtures, and effects, and take possession of the house on or before September 29th. The plaintiff agreed to give up possession of the premises, effects, and stock by that day, to assign licenses, to repair or allow for all damaged outside windows, and to clear rent, taxes, and out-goings to the day of quitting possession. The expenses of the agreement were to be paid by the parties in equal moieties; and either party, not fulfilling all and every part, was to pay the other £500, thereby settled and fixed as liquidated damages.

¹ 2 Pars. on Contr. 433.

² Per Hubbard, J., *Hodges v. King*, 7 Met. 586.

(a) The question referred to in the text has not ordinarily been raised in reference to a *bond with penalty*, the amount of such penalty being usually made subject, as the term itself implies, to the abatement or reduction in Chancery, required by the circumstances of the case. But, in a late case, in Massachusetts, where the penalty of a bond was in the usual form, and no provision made for liquidated damages; it was still held, that the amount of the penalty should be the measure of the damages. Hubbard, J., says: “The bond has indeed a condition; but that is matter of form, and cannot turn that into a penalty which, but for the form, is an agreement to pay a precise sum under certain circumstances. And the agreement to pay interest on the sum is a strong corroboration of this construction of the instrument; as in penal bonds such a provision is not made, but the party relies on the penalty as the means of furnishing full indemnity for all that may be payable for a breach of the condition.” 7 Met. 588.

Held, on breach of the agreement by omission to take an assignment, the defendant was liable to pay the whole £500, and that it was not a mere penalty to cover such damages as might be actually incurred.¹

4. In an agreement for the sale of a public-house, by the defendant to the plaintiff, it was stipulated, that the seller should not be concerned in carrying on the business of a publican within a mile from the house, "under the penal sum of £500, the same to be recoverable as and for liquidated damages." The defendant opened a public-house about three quarters of a mile off. No evidence of actual damage was given by the plaintiff; but for the defendant some witnesses stated, that the plaintiff had spoken of the injury as not considerable. It was held at *Nisi Prius*, that the whole sum was recoverable, as stipulated damages, but left to the jury to state what was the actual damage. The jury found for the whole sum, and the Court of Common Pleas refused to grant a new trial.² Best, C. J., says :³ "The law relative to liquidated damages has always been in a state of great uncertainty. This has been occasioned by Judges endeavoring to make better contracts for parties than they have made for themselves. I think that the parties to contracts, from knowing exactly their own situations and objects, can better appreciate the consequences of their failing to obtain those objects than either Judges or juries. Whether a contract be under seal or not, if it clearly states what shall be paid by the party who breaks it to the party to whose prejudice it is broken, the verdict in an action for the breach of it should be for the stipulated sum. A Court of Justice has no more authority to put a different construction on the part of an instrument ascertaining the amount of damages, than it has to decide contrary to any other of its clauses. The claim for damages must depend not only on things which have been done, which are difficult

¹ *Reilly v. Jones*, 1 Bing. 302.

² *Crisdee v. Bolton*, 3 Car. & P. 240.

³ 3 Car. & P. 242.

of proof, but on what may be done, which it is impossible to prove. I cannot subscribe to the doctrine attributed to Lord Tenterden in *Randall v. Everest*. If it be doubtful from the terms of the contract, whether the parties mean that the sum mentioned in it shall be a penalty or liquidated damages, then I should incline to consider the change as creating a penalty, and not giving stipulated damages. So if but one sum is mentioned, and there may be several breaches, and it is not distinctly stated that this sum is to be paid on each breach, I should hold, as the Court held in *Astley v. Weldon*, that the sum mentioned was to be considered only as a penalty. In this case the sum of £500 is to be paid for the doing of one thing only. It is called a *penal* sum, and I will admit that the parties considered it as something more than compensation; but they have expressly agreed that this penal sum shall be recovered as and for stipulated damages."

5. When a contract is such that the damages, in case of a violation, will be *uncertain* in their nature and amount, and the parties have stipulated that, in the event of a breach, a certain sum shall be paid by the party in default as *liquidated damages*, that sum will be treated as the measure of damages. Thus A. contracted to sell land and goods to B., for which B. agreed to pay a certain sum, delivery and payment to be made at a future day; the party who failed to perform his part of the agreement to pay the other \$1,000. Held, that A., having performed or offered to perform his part of the contract, was entitled to recover \$1,000 as liquidated damages.¹ Strong, J., says:² "There are various legal rules for ascertaining whether a sum named in a contract, to be paid by a defaulting party, was intended as liquidated damages, or as a penalty merely. Among these rules is one well established by numerous decisions, that when a contract is such that the damages, in case of a violation of it, will be uncertain in their nature and amount, and the parties

¹ *Mundy v. Culver*, 18 Barb. 336.

² *Ibid.* 338-9.

have stipulated that in the event of a breach a certain sum shall be paid by the party in default, as liquidated damages, they will be regarded as having so intended, and that sum will be treated as the measure of damages. The sum agreed upon as damages, was designed as the damages for a total non-performance. The case is not, therefore, one of a contract, with several stipulations of various degrees of importance, as to some of which the damages might be considered liquidated, whilst for others they may be deemed unliquidated, and a sum of money is made payable on the breach of any of them; nor is it the case of a larger sum stipulated as damages for the non-payment of a smaller one; in which cases the Courts have held the sum named, although denominated liquidated damages, a penalty. Indeed, the contract in question, in legal effect, provides for a single act on each side—the sale of the land and goods by the plaintiff, and the payment therefor by the defendant. Notwithstanding the form of the contract, it is apparent that what was to be done by each of the parties, was regarded by them as much an entire thing as if it had formed the subject of a single stipulation.”

6. An agreement not under seal for the lease of a public house contained a clause, that the party neglecting to comply with his part of the agreement should pay the sum of £100, mutually agreed upon to be the damages ascertained and fixed on breach thereof. Held, the party making a default was not liable beyond the damages actually sustained.¹ Abbott, C. J., says:² “A great deal has been said about the different import of the terms *penalty* and *stipulated damages*; but I am of opinion, and shall always hold so until compelled by a higher authority to say otherwise, that whether the term *penalty* or liquidated damages be used in the agreement, a party who claims compensation for a default shall only be allowed to recover what damage he has really sustained. Whatever language the parties may choose to use,

¹ *Randall v. Everest, M. & M.* 41.

² *Ibid.* 42.

I am of opinion, in point of law, that a jury cannot be called upon to give more damage than the party has really sustained. I confine my opinion to contracts not under seal; instruments in that form may, perhaps, receive a different construction."

7. Defendant agreed to grant a lease with the usual covenants, and plaintiff to execute a counterpart and pay the expenses; and, for the true performance of the agreement, each of the parties bound himself in the penalty of £500, to be recovered against the defaulter as liquidated damages. Held, that the £500 must be considered as a penalty, and not as liquidated damages.¹

8. A. agreed with B. to sell him the stock and good-will of his business, and to demise to him his house in which the business was carried on, for which B. was to pay £800, and to take the furniture and fixtures at a valuation. They were afterwards valued at £174. £400 was paid to A. at the time of executing the agreement, and B. agreed to accept and pay two bills of exchange, one for £400, payable twelve months after date, and the other for £174, payable two months after date; and A. agreed not to carry on the business within five miles of the house. And, for the true performance of this agreement, each of them did thereby bind and oblige himself to the other of them in the penal sum of £500, to be recoverable for breach of the said agreement in a Court of Law, as and by way of liquidated damages. Held, that this sum was a penalty, and not liquidated damages.² Abbott, C. J., says: "The sum of £500 is described in the same sentence as a penal sum and as liquidated damages. Now both expressions cannot be satisfied. We must therefore look to the whole of the agreement in order to ascertain whether the £500 was intended to be a penalty or liquidated damages; and, considering the whole agreement, we think it was clearly intended as a penalty."

¹ *Boys v. Auncell*, 5 Bing. N. C. 390.

² *Davies v. Penton*, 6 B. & C. 216, 222; 9 Dowl. & Ry. 369.

Bayley, J., says :¹ "Where the sum which is to be a security for the performance of an agreement to do several acts, will, in case of breaches of the agreement, be in some instances too large, and in others too small a compensation for the injury thereby occasioned, that sum is to be considered a penalty. It could not have been intended here to fix the sum of £500 as a maximum, if nothing was paid in respect of either of the bills, for in that case the party would be entitled to receive £574. In that case £500 would be too small a compensation for the breach of the agreement. On the other hand, if the £400 bill had been paid, and that for £174 alone remained unpaid, the £500 would much exceed fair compensation for that breach of the agreement." Holroyd, J., says :² "If it is a penalty, the Court will treat it as such, and the stipulation that it shall be recovered as liquidated damages will not prevent the party from insisting on the compulsory provision of the Stat. 8 & 9 Will. III., c. 11, s. 8, as to assessing damages."

9. A principal test of *unliquidated* damages, even where there is an express provision that they shall be *liquidated*, has been held to be, that the agreement has been *violated only in part*.

10. The plaintiff agreed to convey certain premises to the defendant upon certain payments being made. A stipulation in the agreement was, "to pay one to the other, the sum of \$500 as liquidated damages, in case one of the parties shall fail to perform said contract." The defendant paid \$100 of the purchase-money. Held, the \$500 was to be deemed liquidated damages, but payable only in case of a total failure to perform the contract, and that the defendant was only liable for actual damages.³

11. The defendant gave a bond to the plaintiff "in the full and just sum of \$500 liquidated damages," to convey to the plaintiff on demand 3000 feet of land in a city on the corner of two streets, named, including a certain house and

¹ 6 B. & C. 223.

² *Ib.* 224.

³ *Lampman v. Cochran*, 19 Barb. 388.

shed ; and afterwards, on demand of the plaintiff, executed a deed to him of a lot of land, described by metes and bounds, at the corner of those streets, with the buildings thereon standing. The plaintiff accepted the deed, and the parties agreed that, if not right, it should be made so. A subsequent survey showed, that the land conveyed did not include the shed, and contained but 2,513 feet. In an action on the bond, held, as the plaintiff had accepted the deed in part-performance of the bond, the sum of \$500 was not to be regarded as liquidated damages, but that the plaintiff could recover only his actual damages. Shaw, C. J., says : " The question, what is liquidated damages and what a penalty, is often a difficult one. It is not always the calling of a sum, to be paid for breach of contract, liquidated damages, which makes it so. In general, it is the tendency and preference of the law, to regard a sum stated to be payable if a contract is not fulfilled, as a penalty and not as liquidated damages ; because then it may be apportioned to the loss actually sustained. But without going at large into the subject, one consideration, we think, is decisive, against recovering the sum in question as liquidated damages, namely, that here there has been a part-performance, and an acceptance of such part-performance. If the parties intended the sum named to be liquidated damages for the breach of the contract therein expressed, it was for an entire breach. Whether divisible in its nature or not, it was in fact divided by an offer and acceptance of part-performance. It is like the case of an obligation to perform two or more independent acts, with a provision for single liquidated damages for non-performance ; if one is performed, and not the other, it is not a case for the recovery of the liquidated damages."¹

12. While it has been held that the full amount of a penalty, or even of liquidated damages, is not in all cases recoverable ; it has also been held, that the party for whose benefit the penalty is provided does not thereby lose his right of otherwise enforcing the contract.

¹ *Shute v. Taylor*, 5 Met. 61, 67.

13. A proviso was inserted in articles for the purchase of an estate, that, if either party should break the agreement, he should pay £100 to the other. The defendant, the vendor, on being offered two years' purchase more, accepted it, notwithstanding his agreement. Lord Hardwicke decreed a specific performance of the articles, remarking as follows: "As to the defence of the stipulated sum, I cannot take this, to let off either party when they please, but is no more than the common case of a penalty, for it might be inserted by the plaintiff in order to be paid for his trouble of viewing and measuring the estate, taking plans, &c., supposing the defendant should not be able to make out a title. In all these cases where penalties are inserted in a case of non-performance, this has never been held to release the parties from their agreement, but they must perform it notwithstanding."¹

14. But, upon a sale of land at auction, if the terms are, that the purchaser shall within thirty days give his notes with two good indorsers, and, if he shall fail to comply within the thirty days, then the land to be resold on account of the first purchaser; the vendor cannot maintain an action against the vendee for a breach of the contract, until a resale shall have ascertained the deficit, although the vendee should instruct an attorney to draw a deed, and insert his name as purchaser. Livingston, J., says: "The plaintiffs offered no evidence of any resale, or of any deficiency arising thereon, but contended, that the remedy by a resale was merely cumulative, and did not take away the right of action against the defendant for his violation of the contract. Such is not the opinion of this Court. The vendee, by the terms of sale, had an option of taking the estate after it was bid off to him, and in case of refusal, of having it sold again *on his account*. It might have produced more than on the first sale, in which case the surplus would have belonged to him; or the same price might have been obtained, and then he

¹ Howard v. Hopkins, 2 Atk. 370.

would have lost nothing; or it might have sold for less, and then by paying the difference which would have formed his whole loss, he would not have been exposed, as he must be if this action proceeds to have damages assessed against him, by some uncertain and arbitrary or unsatisfactory rule, which might be adopted by a jury. Of these advantages which were reserved to him by the terms of the auction, the plaintiff had no right to deprive him. The Court is further of opinion, that nothing which was done after the sale at all varied the right of the parties.”¹

15. The *deposit* made by a purchaser may be considered somewhat in the light of a penalty. And it has been held, in case of a sale *by order of Court*, that, where a contract is *inequitable*, the purchaser, on submitting to forfeit his deposit, will be discharged from his purchase. The following remarks of Lord Macclesfield explain the grounds of this decision: “A Court of Equity ought to take notice under what a general delusion the nation was at the time when this contract was made by Mr. Frederick, when there was thought to be more money in the nation than there really was, which induced people to put imaginary values on estates; that as upon a contract between party and party, the contractor would not be decreed to pay an unreasonable price for an estate, so neither ought the Court to be partial to itself, and do more upon a contract made with itself, or carry that further, than it would a contract betwixt party and party. On the other hand, the Court might be said to have rather a greater power over a contract made with itself than with any other. That the deposit was supposed to be a proper pledge for securing the seller in case the intended purchaser should afterwards go off; and had it not been sufficient, the other side might have moved to have such deposit increased; but being thought a sufficient pledge, it was punishment enough if the party that made it was to lose it, and satisfaction enough to the seller if he was to

¹ Webster v. Doran, 7 Cranch, 399.

have the benefit of keeping the deposit; that in this case the deposit was nearer title of the purchase-money; so that if the seller could get as much within £1,000 of any other purchaser, he would be no loser; and if he could not get so much within £1,000, then it would appear to be dear sold; and consequently a bargain not fit to be executed by this Court," &c.¹

16. But where, in a sale at auction, one of several conditions is, that, if the purchaser shall fail to comply with any of the conditions, the deposit shall be forfeited as liquidated damages, such condition forms no *qualification* of the general promise to complete the purchase. Therefore, upon a wrongful abandonment of the contract, on the part of the purchaser, the vendor may recover damages beyond the forfeited deposit, and is not bound to state this condition in declaring upon the contract. Lord Denman, C. J., says: "It is not meant, by this condition, that the deposit shall be regarded as liquidated damages as against a party who breaks off altogether. It is intended to be so only in case of a breach of any of the particular conditions."²

17. Bill for specific performance. The defendant, upon the marriage of his daughter with the plaintiff, entered into a bond with a penalty of £5,000, to settle one third of whatever estate in lands should come to him on the death of his father. The father died, and a considerable estate descended to the defendant, but he failed to make the settlement within the time limited. The defendant by his answer insists, that he ought to be left to sue the penalty, having his remedy upon that at law; but the Lord Chancellor decreed a specific performance, saying it was unreasonable to give an election to the defendant, when the plaintiff could have none; for if the lands to be settled were not of the value of £5,000, he could never resort to the penalty; and, on the other hand, if they exceeded that value, it was not just he should be left

¹ Savile v. Savile, 1 P. Wms. 745-7.

² Icely v. Grew, 6 N. & M. 467-471.

to it; neither would it answer the intent of the parties, which was to secure a provision to the wife and children by the settlement of the estate; because if the plaintiff was to have the penalty, it must be as a debt due to himself, and this Court would have no power to compel him to do any thing out of it for their benefit.”¹

18. A. agrees to demise a house to B., in consideration of £300 then paid “by way of deposit and in part of £5,500,” the whole purchase-money; possession to be delivered and accepted on a day named. B. agrees to accept such demise, but, on the day, refuses to accept; and A. afterwards disposes of the house to a third party. It was doubted whether, upon these terms alone, the deposit should be forfeited, or whether B. could recover the deposit from A. But it was held, that the intention might be collected from other parts of the agreement. Hence, as a distinct clause provided that either party making default should forfeit £1,000, it was held that the deposit was not to be forfeited, and might be recovered back. But not before A. disposed of the house. And an action for the deposit, brought after the day named, in the agreement, but before A. had disposed of the house, having failed, was held no estoppel to an action brought after A. had disposed of the house. And it was held that the facts negatived a plea, that the causes of the two actions were identical. Lord Denman, C.J., says: “The question, whether the deposit is forfeited, depends on the intent of the parties to be collected from the whole instrument; but, as this imposes on either party that should make default a penalty of £1,000, the intent of the parties is clear that there should be no other remedy. This vendor may sue for the penalty, and recover such damages as a jury may award; but he cannot retain the deposit; for that must be considered, not as an earnest to be forfeited, but as part-payment. But the very idea of payment falls to the ground when both have

¹ Hopson v. Trevor, 1 Str. 533; 2 P. Wms. 191.

treated the bargain as at an end; and from that moment the vendor holds the money advanced to the use of the purchaser.”¹ (a)

¹ Palmer v. Temple, 9 Ad. & Ell. 508.

(a) The following instructive view of the law relating to liquidated damages is given by Mr. Greenleaf in his valuable work upon Evidence. “In cases of contract, if the parties themselves have *liquidated the damages*, the jury are bound to find the amount thus agreed. But whether the sum, stipulated to be paid upon breach of the agreement, is to be taken as liquidated damages, or only as a penalty, will depend upon the intent of the parties, to be ascertained by a just interpretation of the contract. And here it is to be observed, that the policy of the law does not regard penalties or forfeitures with favor; and that equity relieve against them. And therefore, because, by treating the sum as a mere penalty, the case is open to relief in equity, according to the actual damages, the sum will generally be so considered; and the burden of proof will be on him who claims it as liquidated damages, to show that it was intended as such by the parties. This intent is to be ascertained from the whole tenor and subject of the agreement; the mere use of the words “penalty,” “forfeiture,” or “liquidated damages,” not being regarded as at all decisive of the question, if the instrument discloses, upon the whole, a different intent. The cases, in which the sum has been *treated as a penalty* will be found to arrange themselves into five classes, furnishing certain rules by which the *intention* of the parties is *ascertained*: 1. Where the parties, in the agreement, have *expressly declared* the sum to be intended as forfeiture or a penalty, and no other intent is to be collected from the instrument. 2. Where it is *doubtful* whether it was intended as a penalty or not; and a certain damage, or debt, less than the penalty, is made payable, on the face of the instrument. 3. Where the agreement was evidently made for the attainment of another object, to which the sum specified is *wholly collateral*. This rule has been applied, where the principal agreement was, not to trade on a certain coast; to let the plaintiff have the use of a certain building; or of certain rooms; and, not to sell brandy, within certain limits; but the difference between these and some other cases, which have been regarded as liquidated damages, is not very clear. 4. Where the agreement contains *several matters of different degrees of importance*, and yet the sum named is payable for the breach of any, even the least. Thus, where the agreement was, to play at Covent Garden, and to conform to *all* the rules of the establishment, and to pay £1,000 for *any* breach of them, as liquidated damages, and not as a penalty, it was still held as a penalty only. 5. Where the contract is *not under*

19. In the nature of liquidated damages, is the agreement, sometimes made, that the amount of damages shall be determined by *arbitration*.

20. Upon this point it has been held, that, where one promises to convey land for the sum at which it shall be appraised by three men; it is not necessary that they should be unanimous in their appraisal, in order to bind him. Shaw, C. J., says: "This would constitute a valid objection to an action on an award founded on a submission at common law, there being no stipulation that a majority should decide. The question arises here, however, under different circumstances; the plaintiff founding his cause of action on the promise of the defendant to convey to him the land. In a case like the present, if it appears that the plaintiff has done all in his power to procure an award fixing the amount to

seal, and the damages are capable of being certainly known and estimated; and this though the parties have expressly declared the sum to be as liquidated damages.

On the other hand, it will be inferred, that the parties intended the sum as *liquidated damages*: 1. Where the damages are uncertain, and are *not capable of being ascertained* by any satisfactory and known rule, whether the uncertainty lies in the nature of the subject itself, or in the particular circumstances of the case. This rule has been applied, where the agreement was, to pay a certain sum for each week's neglect to repair a building; for each year's neglect to remove a lime-kiln; for not marrying the plaintiff; for running a stage on a certain road, in violation of contract; for breach of a contract not to trade, or practice, within certain limits; and for not resigning an office, agreeably to a previous stipulation. 2. Where, from the nature of the case, and the tenor of the agreement, it is apparent, that the damages have already been the subject of actual and fair calculation and adjustment between the parties. Of this sort are agreements to pay an additional rent for every acre of land, which the lessee should plough up; not to permit a stone weir to be enlarged, "under the penalty of double the yearly rent, to be recovered by distress or otherwise;" to convey land, or, instead thereof, to pay a certain sum; to pay a higher rent, if the lessee should cease to reside on the premises; that a security should become void, if put in suit before the time limited in a letter of license granted to the debtor; and, to pay a sum of money, in goods, at an agreed price." 2 Greenl. Ev. §§ 258, 259.

be paid by him, in pursuance of the terms of the contract, we do not think that the act of any one of the persons thus selected as arbitrators, in refusing to concur with his associates in fixing the sum to be paid, should operate to divest the rights of the plaintiff arising under this contract. If the sum to be paid by the plaintiff, before he was entitled to the conveyance, could not be adjusted in the manner contemplated by the parties, and this state of things occurred without the fault of the plaintiff, the effect must be, that he must pay for the land such a sum as was reasonable, and such sum as the arbitrators ought to have awarded. The defendant has refused, on his part, to make the conveyance to the plaintiff which he stipulated to make, and has therefore rendered himself liable in damages to the plaintiff.”¹

21. Agreement between vendor and purchaser of a copyhold estate, for themselves and their representatives, to fulfil the contract and to refer the question of value. One of the parties dying, the representatives cannot annul the decision of the referee, by showing an error in his estimate, or compel the acceptance of the penalty, under which the agreement was secured, in satisfaction of their breach of contract. Strange, M. R., says: “Whatever be the real value is not now to be considered, for the parties made Harris the judge on that point; they thought proper to confide in his judgment, and must abide by it, unless they could have made it plainly appear, that he had been guilty of some gross fraud or partiality. It is like the case of a submission to arbitrators, whose award will never be set aside but on the plainest proof of fraud or partiality. The defendants object, that they were not privy to, nor had any notice of the adjudication. Had Mr. Harris proceeded *ex parte*, and consulted with, or heard the plaintiff on that head, there might have been some weight in this objection; but it does not appear he consulted either party, nor was it necessary he should. The difference of the valuations of this estate can never be

¹ Phippen v. Stickney, 3 Met. 384, 389, 390.

a reason for the Court to set aside the adjudication, for that is the very point submitted to Mr. Harris's judgment; and, were the Court to set aside awards, where no improper partiality, or collusion appeared, merely on the merits of the case, awards would answer no end, for those very disputes they are designed to prevent. It is very well known, that a party may come here for a specific performance of an agreement, notwithstanding the insertion of a penalty in it."¹ So, under an act incorporating a company for the erection of a market, and authorizing them to purchase certain scheduled hereditaments, and to give notice to parties interested to send in their claims, and directing that, in case of non-acceptance of the terms offered by the company, the value shall be assessed in a certain mode; the company cannot, after giving the notice, abandon the purchase; and, in such a case, the Court granted a mandamus for the issuing of the statutory process to assess the value.²

22. Another question has arisen, in connection with the agreement to settle damages by arbitration, namely, as to the interference of a Court of Equity in decreeing *specific performance*. (a) Upon this subject it is held, that equity will not interfere to compel specific performance, unless it can itself execute the whole contract, in the terms specifically agreed upon. Accordingly, where a bill prayed specific performance of a contract, one term of which was to the effect, that, if any damage should result to the defendant from certain works, the erection of which had been agreed upon between the parties, the plaintiff would give to the defendant an equivalent in land, the amount of damage and

¹ *Belchier v. Reynolds*, 2 Ld. Keny. 2d part, 87, 91.

² *The King v. Hungerford, &c.* 1 Nev. & Mann. 112.

(a) Proviso in articles for purchase, that, if either should break the agreement, he should pay £100 to the other. The defendant, on being offered two years' purchase more, accepted it. Lord Hardwicke decreed a specific performance of the articles. *Howard v. Hopkyns*, 2 Atk. 371.

the quantity of land to be ascertained by certain arbitrators; held, the Court had not jurisdiction to grant such relief; and the execution of a deed, containing covenants for the performance of that part of the contract which lay in *feri*, would not be a specific performance. Lord Chancellor Sugden says: "The Court acts only, when it can perform the very thing, in the terms specifically agreed upon; but when we come to the execution of a contract, depending upon many particulars, and upon uncertain events, the Court must see, whether it can be *specifically* executed; nothing can be left to depend upon chance; the Court must itself execute the whole contract. There are cases where some of the acts to be done, consequent on the specific execution of the contract, may be performed subsequently. Thus a contract for sale of timber can be specifically executed, although the timber is to be cut down at a future time or at intervals, and the money to be paid by instalments. It is a certain contract, and the manner of dealing with the thing sold, by future cuttings, is no objection to a specific performance. The one man sells the timber, and the other pays for it the price contracted for. Here part of this contract is at once capable of a specific execution; this admits of no doubt. But then, by the rule of the Court, if I am called upon to execute the contract, I must myself specifically execute every portion of it; I cannot give a partial execution of the contract. If a man agree to do a certain act, for example, to dispose of an estate, with a covenant for something to be done hereafter, the Court can carry such a contract into specific execution. The decree would give all that is presently contracted for; the immediate transfer of the estate itself, and compel the party to enter into the covenant to do the particular thing. But here, there is an entire contract, which must be executed. Certain things were to be done at once, and certain other things were dependent upon future contingencies. The plaintiff has waived his right, as far as he could. But by another clause it is provided, that if any

damages should arise to the lands of Mr. Edwards, from the erection of the dam, the plaintiff should give an equivalent in land as a compensation for such damage; which damage the arbitrators were to fix at the time of adjusting the other matters, and also lay off the quantity of land to be given in lieu of such damage. It is said, that this operates either *in præsentia*, and has been executed by the award or that the agreement, in this respect, might form a part of the deed. I am clearly of opinion, that this is not a matter to be presently ascertained, but is dependent upon the operation of works contracted to be erected, and can only be ascertained, after the works have been in operation. The provision was to guard against the probable chance of future damage to the defendant's land; no evidence has been read, to show that it formed any part of the award, or that the arbitrators took it into their consideration, and the language of the award does not imply that they did. Well, then, it is a prospective measure, and what is the decree to be? It cannot be made the subject of covenant; that is not the agreement of parties. Am I to decree the specific performance of that which is now capable of being executed? and then (for I must go on) am I to decree, that if hereafter, when the works not now commenced, are completed, damage should arise to the defendant's land, the arbitrators shall ascertain the damage, and the plaintiff shall convey land, equivalent in value to such damage? No one ever heard of such a decree. It is impossible to execute this contract specifically.”¹

23. In this connection we may also refer to some other points, upon which a Court of Equity has been called upon to interfere with the question of damages.

24. Under a bill by a vendee to have the contract delivered up, on the ground of defective title in the vendor, and for compensation, a decree was made for delivering up the contract, without prejudice to an action, instead of an inquiry before the master.² So it is held that the plaintiff in

¹ Gervais v. Edwards, 2 Dru. & W. 80, 82.

² Gwillim v. Stone, 14 Ves. 128.

a bill for specific performance is not entitled, generally, to damages for non-performance, to be ascertained by an issue or a reference to the master; although a distinction was made as to cases of *compensation*; as for a part subject to tithes, though represented tithe-free; giving the purchaser, if he chooses to take the purchase, a right to compensation, but not to compel the vendor to purchase the tithes. Lord Eldon says: "The case is very different from giving compensation out of the purchase-money. My opinion is, that this Court ought not, except under very particular circumstances, as there may be, upon a bill for the specific performance of a contract to direct an issue, or a reference to the master, to ascertain the damages. That is purely at law. It has no resemblance to compensation. Where, for instance, an estate is held with an engagement, that a certain number of acres are tithe-free, which is not the case, and the vendee contracts to sell to another person with a similar engagement; this Court would give compensation for so much as was not tithe-free; but would not give compensation for the damage, sustained by not being able to complete the subsequent contract; which might fairly be offered to the consideration of a jury. About the time when *Denton v. Stewart* occurred, some degree of irritation was excited in the Court by persons, called land-jobbers, contracting for estates without any intention of paying for them, and setting up defects of title, merely with the view of gaining time to dispose of them; and on that ground Lord Rosslyn was prevailed upon to direct a reference of the title immediately on motion; and there is not much mischief in that upon a simple case of specific performance, where there is nothing more; but the relief may be so modified and qualified, with reference to the nature and object of the contract, that, unless it is purely that point, great difficulty may arise." The Lord Chancellor proceeds to remark upon a leading case, relied upon as sustaining a different doctrine: "In *Denton v. Stewart* the defendant had

it in his power to perform the agreement; and put it out of his power pending the suit. The case, if it is not to be supported upon that distinction, is not according to the principles of the Court.”¹

25. So, in a later case, an attorney, falsely representing himself to be authorized by the owners, entered into an agreement on their behalf to sell a house to the plaintiff, and received a deposit. The plaintiff filed a bill against the owners and the attorney, praying a specific performance, and in the alternative, that, if the agreement could not be enforced against the owners, then the attorney might repay the deposit and the costs incurred by the plaintiff and the costs of the suit. Held, the remedy of the plaintiff against the attorney being altogether at law, could not be had in this suit, and the bill was dismissed with costs. Lord Langdale, M. R., says: “The question is, whether where a party, having no sufficient authority, enters into an agreement, the disappointed purchaser can come here for the recovery of damages which he has been put to? No authority was produced, and I believe that none exists, for such an interposition by this Court. Judges have always in modern times thought, that this was not the Court for recovery of damages, and that the proper mode of obtaining relief was by an action at law; and it is reasonable that it should be so.”²

26. In deciding between the remedies of *specific performance* and *damages*, it has been held that specific execution of an agreement will be decreed, where damages would not answer the intention in making the contract, and a specific performance is therefore essential to justice. But equity will not decree specific performance of a covenant, where, from circumstances, it is become unconscientious strictly to enforce performance; except on the terms of the plaintiff's submitting to a conscientious modification of the covenant;

¹ Todd v. Gee, 17 Ves. 273, 276.
See Greenaway v. Adams, 12 Ves. 395, 465.
p. 139, n.

² Sainsbury v. Jones, 2 Beav. 462,

in which case such modified performance will be decreed, especially where the conduct of both parties for a great length of time has caused the covenant to be so acted upon, as to make it unconscionable to refuse a specific performance. (a) It is said by the Court: "The cases in which a Court of Equity decrees specific performance of contracts, are generally cases in which damages (which might be recovered at law) would not answer the intention of the parties in making the contract, and a specific performance, as far as the contract can be performed, is therefore essential to justice. A Court of Equity frequently decrees specific performance, where the action at law has been lost by the default of the very party seeking the specific performance, if it be, notwithstanding, conscientious that the agreement should be performed, as in cases where the terms of the agreement have not been strictly performed on the part of the person seeking specific performance, and, to sustain an action at law, performance must be averred according to the very terms of the contract. The Court ought not, I think, to give specific performance according to the letter of the covenant, for that would be unconscientious against the defendant, in consequence of the change of circumstances. But because the plaintiffs ought not to have the covenant performed literally, they are not to lose their property entirely. The Court will execute the covenant according to a

(a) In the following case, relief in equity was granted, by way of damages, upon much less restrictive principles than those stated in the text. On a bill for specific performance of an agreement for the sale of a house, the plaintiff made out his case; but, it appearing that the defendant had actually sold the house to another person, for a valuable consideration, and without notice; the Court directed the master to inquire, what damages the plaintiff had sustained by non-performance of the agreement, and that such damages, together with costs, should be paid by defendant. *Denton v. Stewart*, 1 Cox, 258.

This case, however, has been virtually overruled in *Gwillim v. Stone*, 14 Ves. 128; and *Jenkins v. Parkinson*, 2 M. & K. 5. See pp. 137-8.

conscientious modification of it, to do justice as far as circumstances will permit.”¹

27. After a decree for specific performance, the defendant cannot proceed by action at law on the contract for damages.² The Vice-Chancellor says: “My decree proceeds upon the ground that the defendant had dispensed with the time stated in the contract. If the plaintiff in equity had before the decree applied for an injunction to restrain the defendant from proceeding in an action at law to recover damages, I should, upon the same principle, have then granted the injunction; and *à fortiori*, I must grant it now. The proceeding at law is inconsistent with the decree in equity.”

28. But a remedy was granted by supplemental bill, after a decree for specific performance, for the damages occasioned to the plaintiff by the abstraction by the defendant, *pendente lite*, of part of the subject-matter of the suit, being stone in a quarry.³

¹ Davis v. Hone, 2 Scho. & Lef. 341, 347.

² Reynolds v. Nelson, Madd. & Geld. 290.

³ Nelson v. Bridge, 2 Beav. 239.

CHAPTER XXXVI.

INTEREST, RENTS AND PROFITS, IMPROVEMENTS.

1. WE have already (Chap. 4,) treated the subject of *interest*, either upon purchase-money unpaid, or paid and recovered back; in connection with *the price as part of the contract*. As making part of the *damages*, to be recovered by a vendor or vendee, the same topic may now be somewhat further considered.

2. Upon this subject it is held, that a purchaser in possession (*a*) shall pay interest on the purchase-money unpaid.¹ It is said,² "A party withholding money from a person entitled to it ought to pay to the person thus injured, the interest which he might have made of it, if it had been paid before." So it is said, per Thurlow, Ld. Ch.,³ "He (the purchaser) must pay interest. A man cannot purchase a dry reversion, and then lie by for years and expect to pay no more for it then, than if he had completed it immediately."

3. So it is held, that the rents belong to the vendor till his title is made good. Afterwards, the purchaser takes them

¹ Burnell v. Brown, 1 Jac. & Walk. 168.

² Ibid. 175.

³ Child v. Abingdon, 1 Ves. 94.

(*a*) In Fludyer v. Cocker, 12 Ves. 25, the act of taking possession was deemed an implied agreement to pay interest.

In M'Kay v. Melvin, 1 Ired. 73, the purchaser went into possession, and the delay was caused by the vendor's death. The vendee was held bound to pay interest.

In Mayo v. Purcell, 3 Munf. 243, there was an express contract to pay interest after three months, and, after taking possession of nearly all the premises, the purchaser resisted performance because he did not get possession of the whole. Having notice, decreed against him.

and pays interest on the purchase-money.¹ "The fair terms," it is said, "would be to put the parties in the same situation as if the contract had been performed at the day; and therefore rents should be accounted for on one side, and interest on the other; but then that would be on the ground that the purchaser ought to have taken the estate without a title, for none was ready at the day; therefore the only fair mode is to give the purchaser his interest on the deposit down to the time when the title was cleared by the King's Bench judgment, the purchaser not being bound to take the estate till then."²

4. Upon the sale of a leasehold farm, three years having expired pending a suit in relation to the property, interest was given to the vendor, and a rent set upon it in respect of his possession.³

5. A purchaser, taking possession without a conveyance, was compelled to pay interest; though the money was to be paid at a particular day, on execution of the conveyance.⁴ So a vendee let into possession, the purchase-money remaining unpaid, shall pay interest thereon, though the vendor be in default, unless he has not only kept the purchase-money idle, but given the vendor notice that he has so kept it. Tucker, Pres., says: "As to interest and profits, the vendor is to be considered the owner of the money and entitled to the interest, while the vendee is regarded as the owner of the land and entitled to the profits. But he cannot have both. Where the purchaser is let into the possession, and the perception of the rents and profits of the purchased estates, he must pay interest for his purchase-money; and if the rule be not universal, the party who claims an exemption from its operation, must bring himself within some established exception. That rents and profits ordinarily bear but a small proportion to the interest of purchase-money, cannot be denied. This is very strikingly the case in Virginia.

¹ *Pinke v. Curteis*, 4 Bro. C. C. 329.

² 4 Bro. 333, n.

³ *Dyer v. Hargrave*, 10 Ves. 505.

⁴ *Fludyer v. Cocker*, 12 Ves. 25.

Hence, where there has been a sale and delivery of possession, and the contract has been disaffirmed, there can be no propriety in the application of the rule. Accordingly, it never has been so applied. But where a man purchases land, he has made up his mind to give his money, which would produce a good interest, for land which will produce much less. Thus, in the present case, had the title been made, and the money paid, the purchaser must have been content with the scanty rents, while the seller would have been receiving full interest. Now, since a Court of Equity looks upon the sale as complete so soon as the parties have contracted, it is *quoad* this matter, the same thing as if the conveyance had been actually made; provided the vendee has had actual possession, and uninterrupted enjoyment, and there are no particular circumstances to take the case out of the general rule. From the moment of the contract, the buyer is the owner of the land, and must rest satisfied with his rents; and the seller is the owner of the money, and is entitled to his interest.”¹

6. Where the execution of a deed and payment of the price are to be simultaneous acts, the mere omission of the vendor to give the deed, before demand, or offer of payment, is not such a default as will exempt the vendee in possession from payment of interest.² Thus the plaintiff and defendant were jointly interested in a lease of vacant and unimproved city property. They also had an equitable title to the reversion, under a covenant of the lessor, contained in the lease, to convey the property in fee. The plaintiff contracted to sell to the defendant all his interest in the property, the conveyance to be given, and the price paid or secured, on a certain day. The day passed, nothing having been done in execution of the agreement by either party; but the defendant proceeded to erect stores, &c., upon the land, and received large rents and profits; and, in an account afterwards stated,

¹ Brockenbrough v. Blythe, 3 Leigh, 619.

² Stevenson v. Maxwell, 2 Comst. 408.

he was charged with the purchase-money and interest, but not with any part of the rents. Held, his possession, &c., were under the contract of sale, not the lease, and he was bound to pay interest on the price. The Court remark:¹ "The most that can be said is, that the complainant did not put the defendant in default, not that he was in default himself. This is not sufficient to excuse the payment of interest. Here the defendant had the benefit of the purchase-money. His situation is the same as if he had received a conveyance and given security according to the contract, when he must have paid interest. He was compelled to borrow to make improvements; the money was therefore of importance to him. In addition to which he received all the rents and profits. A weaker case for exemption from the payment of interest, can scarcely be imagined. The fact that the lot was unimproved when sold, does not vary the equity of the case. It was vacant when purchased by these parties, but we cannot suppose that after paying \$6,000 for opening a street, they intended it should remain so. They designed to improve it. The contract deprived the complainant of the right to do this on his own account or in conjunction with the defendant, and transferred that privilege to the latter exclusively."

7. By conditions of sale, the purchase-money was to carry interest, a deposit of £20 per cent. to be paid, and the auction duty borne equally by the purchaser and the vendor. The purchaser paid only the amount of the deposit, and out of it the auctioneer paid the whole of the auction-duty. Held, the portion of the deposit, applied in discharge of the purchaser's moiety of the auction-duty, was to be considered as an unpaid part of the purchase-money, and that the vendor was entitled to interest on it.²

8. Under an inclosure act, an allotment had been made to the impropiator, in lieu of tithes; and, by the act, the tithes were to cease on the allotment being made; but the act did

¹ Ibid. 415.

² *Townshend v. Townshend*, 2 Russ. 303.

not authorize the sale of allotments before execution of the award. In the interim, the impropiator agreed to sell his allotment for £700, to be paid on a certain day, upon execution of a good and valid title. The award was not made until several years after the agreement; but the purchaser had been all along in possession. The Court ordered him to pay four per cent. interest on his purchase-money, from the day appointed, although a good title could not be made until the award was executed.¹

9. The general rule of the Court, on a bill for performance of a sale, is, to allow interest from the period fixed for completion, and to give the purchaser the rents and profits. But where the vendor has unjustifiably caused delay, and the interest will exceed the rents, he will be refused the former, retaining the latter.²

10. A vendee put into possession is bound to pay interest on the balance of purchase-money unpaid, though the vendor binds himself to make a good and lawful title before he calls for the unpaid purchase-money; or though the vendee's contract is, to pay the balance of the purchase-money when a good title is made.³ So a purchaser, thoroughly informed of defects in the title, but agreeing to pay interest from a certain day, shall not be relieved on the ground that he could not get possession of part of the land, which he knew at the time to be held by another person.⁴ So a vendee on credit, to whom a deed is made and possession given, is not excused from paying interest, though payment has been delayed by an adverse claim, and a protracted suit thereon, but which terminated in his favor, he having continued all that time in possession, and enjoyed the issues and profits. The vendor, having only covenanted to sell and convey a perfect title, which was so conveyed, as proved by the result of the trial; not that there should be no adverse claimants; committed no breach of his covenant, which excuses the vendee

¹ Attorney, &c. v. Christ Church, 13 Sim. 214.

² Dias v. Glover, 1 Hoff. Ch. 72.

³ Oliver v. Hallam, 1 Gratt. 298.

⁴ Mayo v. Purcell, 3 Munf. 243.

from paying interest; nor can the vendee's costs be set off against the interest. To excuse the vendee from paying interest during the time that the adverse claim is in suit, it is not sufficient that he should be ready and willing to pay the principal; it ought also to appear clearly, that he did in fact keep the money useless and unproductive by him, and that he gave the vendor notice that it was so unproductive. Although the adverse claim was by the Commonwealth, who proceeded to escheat the land by inquisition, (which was opposed by the vendee by a *Monstrans de droit*, who defeated the claim) the supposed seizin in law into the hands of the Commonwealth by the office found, and the supposed liability of the vendee to the Commonwealth for the rents and profits, did not prevail over the actual seizin of the vendee; and, as he actually enjoyed the issues and profits during the whole time, and by the result became exempted from all liability for them to the Commonwealth, that supposed legal seizin of the Commonwealth forms no excuse to the vendee for not paying interest to the vendor.¹

11. Agreement for the purchase of land, the vendee to take possession immediately, and the vendor, "when thereto requested," to deliver a deed, upon the receipt of which, the vendee was to give three notes, payable in one, two, and three years. The vendee took possession immediately, but the vendor died without giving a deed or receiving the notes. Held, upon a bill by the vendee for specific execution, he should pay interest on the instalments of the purchase-money, as if the notes had been given in a reasonable time after the date of the agreement.²

12. In a contract of sale, if no day be specified for delivering the deed and possession, but the money be payable after delivery of the deed; the deed is to be delivered, and possession given, without delay. If, therefore, in consequence of a misunderstanding, this be not done, the vendor is bound to account for the profits received by him after the

¹ *Selden v. James*, 6 Rand. 465.

² *McKay v. Melvin*, 1 Ired. Eq. 73.

contract; and the vendee to pay interest on the money, from the time when it would have been payable, if the deed had been immediately delivered.¹

13. A purchaser, when an incumbrance has been concealed from him, may require a prompt removal of it; otherwise, he is entitled to a rescission of the contract, and may abandon the possession, unless he chooses to retain it as a trust fund to reimburse himself for money paid. And the effect of retaining possession, until a decree for rescission, will be only to charge the purchaser with interest on the purchase-money, if the possession is of any value.²

14. It seems, that the purchaser of an estate, the value of which is increased by the wearing of lives, may be called upon to pay interest on the purchase-money, in respect of that increased value, from the time when he becomes by law entitled to receive the rents and profits.³

15. The contract of sale and purchase being often accompanied by a *deposit* of a portion of the purchase-money; the purchaser as well as vendor may make a claim for interest. Thus it is held, that a purchaser is entitled to interest on his deposit, and to costs at law and in equity, until the vendor has made his title good. But the vendor is entitled to subsequent costs, and may enforce the contract, if his title be good when the report is made.⁴

16. On a motion by a vendor against a vendee in possession, for a reference to set an occupation rent, the title not being completed, an order was accordingly made, and that interest at £4 per cent. upon the deposit should, under the circumstances, be deducted out of such rents.⁵ The Vice-Chancellor remarked :⁶ "A deposit is peculiarly circumstanced. If the auctioneer pays it to the vendor, he does it at his peril; and if the purchase is not completed, the purchaser may recover it from the auctioneer. If then the

¹ *Hundley v. Lyons*, 5 Munf. 342.

² *Cullum v. Bank*, 4 Ala. 22.

³ *Champernowne v. Brooke*, 3 Cla. & Fin. 4; 3 Yon. & Coll. 510.

⁴ *Pincke v. Curteis*, 4 Bro. 329.

⁵ *Smith v. Jackson*, 1 Madd. 618.

⁶ *Ib.* 620.

auctioneer cannot pay over the deposit to the vendor, is he to be considered as his agent? The vendor is responsible for the loss, if any, occasioned by the auctioneer. The vendor should be chargeable with any loss of the deposit received by the auctioneer, because he might, by agreement with the auctioneer, have had the money laid out at interest, or by making the auctioneer a party to a bill for a specific performance against the vendee, obtain an order for payment of the deposit into Court, and have laid it out at interest, which the vendee could not oblige the auctioneer to do, unless with the consent of the vendor. If, therefore, the vendor takes no such steps and the deposit is lost, the loss falls upon the vendor. The deposit is considered as part-payment of the purchase-money. Is it justice, then, that the vendee, having thus paid part of his purchase-money, should not have an allowance for it, in settling what is to be paid as an occupation rent? If the contract is completed, the vendor receives the deposit, with interest; if it is not completed, the purchaser may certainly bring an action for the deposit and interest, though some doubts have been entertained as to the form of the action.¹ The conditions of sale were, not that the deposit should be paid to the auctioneer, but that the vendee should 'pay down immediately a deposit of 15 per cent. in part of the purchase-money.' It was therefore considered on both sides, that the deposit was a part payment of the purchase-money to an agent of the plaintiff."²

17. Where a conveyance is set aside for gross misrepresentations and deceit, the ground of the decision must be considered to have been fraud, and interest is to be paid on the money refunded, without reference to any demand, from the time it was received, and interest on interest from the time of its payment on any of the notes originally given. Woodbury, J., says: "Where contracts are rescinded for

¹ See *Burrough v. Skynner*, 5 Burr. 2639; *Maberley v. Robbins*, 5 Taunt. 625; *Ambrose v. Ambrose*, 1 Cox, 194; *Doyley v. Powis*, lb. 206.

² *Smith v. Jackson*, 1 Madd. 618, 620.

mere mistakes, and the property sold was taken possession of by the vendee, and yielded a regular income, it has often been the practice to set off the income against the interest, and to go into no computations about either, till possession of the premises was given up. Such a rule is often more convenient and easy than just, and could never be equitable unless the property yielded a certain and considerable income. Where interest has in any such cases been given, it usually does not begin till a demand is made to refund the consideration. But here the original bill charges a fraud in the contract of sale, as one ground for rescinding it. The opinion of the Court on that bill was, 'that the contract ought to be set aside, as founded in gross mistake, and gross misrepresentation.' The usual incidents to such a decision must be attached to it. One of them is, that no demand is necessary to obtain interest. But, on the contrary, the taking of the money being wrong and fraudulent in law, the law will grant interest upon it from the time it is so taken. It seems to me more just and equal for the parties, that in all cases of rescinded contracts, interest must be allowed on the money paid from the time of payment till the judgment; and on the other hand, the party occupying the land be charged with rents and profits during the possession, deducting taxes and the cost of any permanent improvements made. Because in some cases the rents are little or nothing, and in others more than the interest. In respect to the sums or amounts, on which interest is to be cast, if the bargain had been to pay a particular sum in money for the whole consideration, and notes had been voluntarily taken in part as a substitute, it would seem to me proper to cast interest on all as if money. The interest then would be from the time of the making of the contract, the execution of it, to the time of final judgment on the whole consideration, and nothing more. But as a part only of the consideration was to be paid at the time in money, and the rest on credit, I am inclined to think the interest should be computed according

to the truth of the transaction, and hence should be cast on the different sums paid from the times actually paid, whether as principal or interest, until the time of the final judgment.”¹

18. The general rule, however, by which a vendee is required to pay interest, is subject to exceptions depending on the circumstances of the case.

19. Thus, in *Blount v. Blount*,² Lord Hardwicke declared, that, as no possession was delivered to the purchaser by virtue of his purchase, and it was not his default at all that the conveyances had not been made, there was no pretence for making him pay interest. The purchaser was in possession before making the purchase. Lord Hardwicke also says, that it cannot be laid down in certain, that from the time of possession a purchaser shall always pay interest, whether the estates are in possession or in reversion ; whether purchased under a private agreement, or under a decree for a sale. As to estates in possession upon a private purchase, the Court never regards execution of articles for purchase, but the time of the execution of conveyances, and even there, if the vendor has made default in letting the vendee into possession, he shall not pay interest for the purchase-money ; but if he has taken possession, the Court will give such interest as is agreeable to the nature of the land purchased. In biddings before masters, they are made general, and the Court discourages any particular terms to be put upon those biddings. If the purchaser has not had possession upon execution of conveyances, he shall not pay interest at all ; from the time of delivery of possession, he shall. Lord Hardwicke further remarks : “ As to what has been said of the advantage a purchaser receives from wearing out of lives, I never knew the Court take this into their consideration as a reason for the purchaser’s paying interest.” So, in *Paton v. Rogers*,³ the Vice-Chancellor said that a

¹ *Doggett v. Emerson*, 1 Woodb. & M. 195, 204.

² 3 Atk. 636.

³ 6 Madd. 256.

decree for interest from the time when the money was to be paid, was generally made; but not where the vendor has improperly delayed the execution of the contract. So, in *Esdale v. Stephenson*,¹ Sir John Leach, V. C., held, that where there was no express stipulation to pay interest, and the delay in completing the contract was occasioned by the vendor; if the interest much exceeds the rents and profits, the Court gives the vendor no interest, but leaves him in possession of the intermediate rents and profits.

20. So, although a purchaser, who takes possession and remains in the uninterrupted enjoyment of it, or who receives the rents and profits, must pay interest; yet, where it is discovered that the titles are defective, and the purchaser offers to rescind on receiving his money; or deposits the purchase-money, with notice to the vendor, till titles are made; he is not bound to pay interest.² Colcock, J., says: "It is a rule founded on the purest principles of equity and justice. It does not always happen that men make judicious bargains, but, generally speaking, a Court may well presume that the use of property is worth the interest of the money. At all events, it is a fair presumption, where nothing to the contrary appears. And in cases where it becomes necessary to allow compensation for the use of property, in the absence of evidence, the value which the purchaser has put on the property must be considered the most correct guide for the Court." But he proceeds to qualify the rule as above stated.³

21. It was agreed, that A. advance B. £4,000 on a mortgage, and, within one week from the agreement, B. deliver to A. or his solicitor a complete abstract of the title, produce the title-deeds, and deduce and show a good marketable title within one month after delivery of the abstract; otherwise

¹ 1 S. & S. 122. See *Monek v. Huskisson*, 4 Russ. 122, n. a; *Jones v. Mudd*, 4 Russ. 118; *Birdsall v. Waldron*, 2 Edw. Ch. 315; *January v.*

Martin, 1 Bibb, 586; *Hart v. Brand*, 1 A. K. Mar. 159.

² *Blount v. Blount*, 3 Atk. 636.

³ *Rutledge v. Smith*, 1 M'Cord, Ch. 403.

it was to be at A.'s option to consider the agreement void. It was further provided, that B. should forthwith pay to A. all costs and charges of investigating the title, &c. Abstracts of title were delivered soon after the agreement, but found defective. From the day when the title ought to have been completed, for about eight months, negotiations were going on, A. objecting to the title, and informing B. that his money had, during the whole interval, been lying idle, and B. endeavoring to amend his title, when he finally failed to do so, and the negotiation ended. A. was to recover the amount of costs and charges incurred by him in investigating the title, and interest on the £4,000, which had been thus lying idle. Held, he could not recover the interest. Bayley, B., says: "The words 'all costs and charges incurred by him in investigating the title,' mean only what are incurred in so doing, and it is impossible to say that those words are sufficiently extensive to cover the interest of money lying by during the time the parties were in treaty. In what situation was the plaintiff? His money was lying at his banker's, and he might have made a bargain that, unless the agreement was carried into effect, then the loss of interest should be paid and borne by the other party."¹

22. A vendee agreed to pay one half of the purchase-money in hand, as soon as the vendor made him a title, and the remaining half in three equal annual payments, the vendee to have immediate possession. Held, the one half of the purchase-money was not due, nor did interest upon it accrue until the title was made, and the remaining half became due in annual payments thereafter. Rogers, J., says: "Until tender of title, the vendor is not entitled to payment of the purchase-money; and it is a general principle, that interest is not demandable of right, until the debt is due, except in pursuance of the terms of an express contract; and no contract is here alleged. But the argument is, that the vendee took possession, and as he enjoys the profits, he

¹ Sweetland v. Smith, 1 Crompt. & Mees. 585.

ought to pay interest. And this is true in ordinary cases, where a time is fixed for the payment of the purchase-money; but the right to take immediate possession was part of the contract, and the vendee's having taken the possession cannot affect the construction of that clause in the agreement on which the debt is only recoverable after a clear title is made. A different construction would render the vendor careless of obtaining and tendering a title, as he would be sure of legal interest, from the time the vendee took possession."¹

23. It is held in New York, that, where payment is to be made on the conveyance of land at a stipulated period, and the land is not then conveyed, the purchaser is not in default, if he omits to pay the price, and no interest is recoverable against him, until he is put in default by the tender of a deed. The general rule in England is, that, from the time fixed for completion of a sale and conveyance, the purchaser is entitled to the profits, and will be compelled to pay interest. The latter is implied from the former. This rule is modified here, by the difference in the situation and productiveness of real estate, and the higher rate of interest; and, in the case of vacant or unproductive property, a contract to pay interest will not be implied, when the purchaser is prevented from obtaining his title through the default or negligence of the vendor, notwithstanding possession by the vendee. So, where he does not go into possession under or in pursuance of the contract, and the delay in its completion is imputable to the seller. Thus the plaintiff and defendant, being joint owners in possession of several lots, under a lease which contained a covenant for a sale and conveyance to the lessees at their option, at a fixed price, tendered the price to the lessor's heirs and representatives, and demanded the title; but the latter, by reason of infancy and other causes, were long unable to convey. The plaintiff then signed an agreement, by which he

¹ M'Kennan v. Sterrett, 6 Watts, 162, 163.

covenanted to execute a perfect conveyance to the defendant of all his right and interest in one of the lots (which was vacant,) on the 1st of May, 1830, in consideration of a large price to be then paid or secured by the defendant, and, when the legal title was obtained, he would give any further assurance, &c. The plaintiff made no effort to complete, or to convey his own interest to the defendant, at or before the day fixed; and, early in 1831, he repudiated the agreement, denied its obligation, and disclaimed the defendant as being the purchaser. The defendant nevertheless proceeded and erected a valuable store on the lot, the income from which exceeded the whole cost of both store and lot; and at the same time he made similar erections on the joint account on the other lots of himself and the plaintiff. In 1836, the plaintiff filed a bill, amongst other things, calling on the defendant to complete the purchase of the lot, and a conveyance was finally in readiness for the defendant in 1841. Held, that the defendant did not take possession under his contract with the plaintiff, and the character of his previous possession was not changed; that the plaintiff was not entitled to interest on the stipulated price from May 1, 1830, nor until he made or offered a full conveyance of his right and title in the lot; but he was entitled to the value of the rents in the intervening period, as the same would have been derived from the lot, in the condition in which it was when he contracted to sell to the defendant. The Court say: "In the case of a vacant city lot, or of wild land, not bought for immediate improvement or cultivation, and where there is no express contract for interest, it would be repugnant to the moral sense to compel the purchaser to pay interest on the price, when through the default or negligence of the vendor, he had not received a conveyance, and thus had been prevented for years from disposing of the property. Nor would the fact that the former had taken all the possession that he could of such property, and had not kept the money by him all the time in order to pay it on receiving the title, affect

the natural equity of the case. Yet by the modern English rule, he would be charged with interest under such circumstances."¹

24. Although a vendee, who enters and continues in possession, must pay interest; yet, where he has been harassed or disturbed in his possession, or there has been wilful and vexatious delay, or gross or criminal laches, on the part of the vendor; or where there are well-founded doubts of the title, or, from neglect or otherwise for a length of time, no administrator of the deceased vendor has been appointed, to receive payment; it is for the jury to determine, whether the vendee is to pay interest. Rogers, J., says: "It is settled, as is said, in *Fashott v. Reed*,² that a purchaser by articles, entering and continuing in possession, must pay interest, although there may be cases where the jury would be justified in refusing it. The doubt is, whether there were not such facts in evidence as made it the duty of the Court to leave the question of interest, as an open question, to be determined by the jury. The interest is given by way of damages, and all the facts should be considered by the jury, under the direction of the Court."³

25. It being a general rule of equity, that a purchaser in possession, receiving the rents, is liable to pay the purchase-money and interest; an agreement which appears to prevent the application of this rule will be examined in a Court of Equity, by its aid, and will or will not be enforced, according to circumstances. Thus the plaintiff, in March, 1812, contracted for the purchase of an estate from the defendant for £90,000. The estate was very much incumbered, and the defendant was to make a title free from all incumbrances except one mortgage of £12,000. The plaintiff, on being put into possession of part of the estates, was to pay £16,000 on the 24th of June, 1812, "and a further sum of £4,000 at Michaelmas next, on the defendant putting the plaintiff into

¹ *Stevenson v. Maxwell*, 2 Sandf. Ch. 273, 278.

² 16 S. & R. 266.

³ *Kester v. Rockel*, 2 W. & S. 365.

the actual possession of the remainder, free from all incumbrances, except the mortgage for £12,000; the further sum of £25,000 in March, 1813; £16,500 in March, 1816; and £16,500 in March, 1818." The plaintiff was to grant the defendant a mortgage of all the estates, for securing these three sums at the respective times aforesaid, "with legal interest from Michaelmas next." The £20,000 not having been paid, nor any of the incumbrances cleared off, a new agreement was entered into in October, 1812. The plaintiff was forthwith to advance £10,000 to pay off certain incumbrances; to be let into immediate possession; to be entitled to the rents and profits "from Michaelmas last," and to be at liberty to cut timber, &c. The conveyances were to be executed as soon as existing difficulties could be removed, and every possible exertion made to that end. It was further agreed, that "the interest of the remainder of the purchase money shall not commence till Lady-day next, in case the title shall be perfected, and the conveyances and other assurances executed at that time, and if not, then to commence on the execution of such assurances." The plaintiff was let into possession, but the business was not completed. In a suit by the plaintiff for specific performance, an account was directed; and it was held, that, under the clause in the second agreement, exempting "the remainder of the purchase-money" from the payment of interest, the sum remaining unpaid of the £20,000 and the three sums constituting the £58,000, must be taken to come under that description.¹

26. With regard to the claim of the vendee for interest, it is held, that a party recovering back a deposit, paid on the purchase of real property, is not entitled to interest.^{2(a)}

¹ *Birch v. Joy*, 18 Eng. L. & Eq. 16.

² *Bradshaw v. Bennett*, 5 C. & P. 48.

(a) The effect of a deposit, with notice to the vendor, is to stop, or determine the rate of interest. It is not a tender and appropriation, transferring the risk as to the principal. Therefore, upon an investment in stock by the vendee, the title not being ready, and the vendor having notice, but return-

27. The amount of damages to be awarded between vendor and vendee may be affected by the value of *improvements*, made by the party in possession under the contract; which amount shall be deducted from the rents and profits.¹ Thus a vendee in possession under a title bond, obtaining judgment on the bond against the vendor for failure to convey, is liable for rents and profits, and entitled to payment for lasting and valuable improvements.² So, where a sale is within the Statute of Frauds, the improvements by the purchaser must be paid for before possession is given, deducting rent, &c.³

28. If a vendee receive payment for improvements on eviction, and afterwards the vendor establish his title to be paramount, the vendee may be compelled to refund to the evictor. On the other hand, if the vendor, on the eviction of the vendee, has refunded the consideration and interest, the vendee is responsible for rents, but must be paid for permanent and valuable improvements.⁴ So one who is permitted to enjoy an estate, and makes improvements during his occupancy, is in equity entitled to remuneration for the improvements. And a purchaser from him is also entitled to have his improvements set off against the rents.⁵ So, on setting aside a sheriff's sale of lands, and ordering possession to be restored, the purchaser should account for rents from the time he took possession, to be reduced from improvements.⁶ So, where a title is fraudulent, equity, in giving

¹ See *Watts v. Waddle*, 6 Pet. 389.

⁴ *Morton v. Ridgeway*, 3 J. J. Marsh.

² *Funk v. M'Keoun*, 4 J. J. Marsh. 257.

170; Acc. *Stedwell v. Anderson*, 21

⁵ *Thompson v. Mason*, 4 Bibb. 195.

Conn. 139.

⁶ *Searcy v. Reardon*, 1 A. K. Marsh. 2.

³ *M'Cracken v. Sanders*, 4 Bibb. 511.

ing no answer, the advantage by a rise, as the loss by the fall, is the vendee's. *Roberts v. Massey*, 13 Ves. 561.

The deposit made upon opening a bidding is considered as part of the purchase-money, although in case the depositor is not the best bidder, it must be returned to him. Therefore, where the deposit is laid out in the public funds, which rise before the purchase is completed, the estate will have the benefit of the rise. *Ambrose v. Ambrose*, 1 Cox, 194.

relief, will reimburse the party in possession, for permanent improvements.¹

29. It has been held, that a purchaser, evicted or released by the vendor for defective title, shall be reimbursed for actual improvements, although he purchased with notice of a doubtful title. The Court remark: "The objections made were, that the purchaser knew, at the time of the purchase, there was a doubt about the title, and therefore ought not to have made any improvements; and that the improvements were chiefly ornamental, and not substantial and permanent. The first objection goes rather to any reimbursement at all, even for the price paid. That objection turns upon the ground, that if the purchaser, before executing the articles, knew that there was a defect of title, or incumbrances, he shall be considered as having entered into the contract with his eyes open, and has chosen his remedy at law, and equity will not assist him, but leave him to his remedy at law. But that point cannot now be made here, for it is agreed that the purchase ought to be and shall be rescinded, and that the purchase-money shall be restored, but without interest, as the occupancy was equivalent to the interest; and this agreement seems best to comport with justice; for there are very few cases in which the Court will not, upon a defect of title, assist the purchaser to recover the purchase-money, and also money laid out in lasting improvements. Where, indeed, the defect was notorious, and the purchaser bought on a speculation, and obtained the property at a price far below the value, on account of the known defect, it seems reasonable that he shall not afterwards claim a reimbursement even of the purchase-money. But nothing of that kind appears to have existed here. It is not pretended that the defect was notorious, and that the property was obtained below the value on account of that defect, and on account of his running the risk of the title." It being objected that the improvements were merely *ornamental*, the Court further

¹ Shine v. Gough, 1 Ball & B. 444.

ordered, that it be “referred to the Master to examine and report what were the expenditures for the useful improvements in question, making deductions for the deterioration of the buildings during the occupancy of the party who made the improvements, and down to the time of the rescission of the contract. The Master afterwards made a report in favor of the complainants, which was confirmed.”¹

¹ *Witherspoon v. Anderson*, 3 Desaus. 245, 246.

CHAPTER XXXVII.

COSTS.

I. HAVING considered the subjects of *damages* and *interest*, to be recovered by the vendor or vendee of real property, we proceed to inquire as to *the costs* of suits brought by these respective parties, the one against the other. The question arises almost exclusively in *Courts of Equity*, where costs are within the discretion of the Court, and not, as for the most part *at law*, absolutely dependent upon the result of the suit. Thus it is held, that costs in equity are in the discretion of the Court, upon the circumstances; not following the event by a positive rule, as at law, though *primâ facie* that is the course, and the opposing circumstances must be brought forward by the party who fails. The *answer* will be considered in settling the question of costs.¹(a)

¹ Vancouver v. Bliss, 11 Ves. 458.

(a) Upon this subject Lord Eldon remarks, (11 Ves. 461): "It would be a most satisfactory doctrine, if I was at liberty to say, that in any species of suit the rule, that prevails universally at law, that the costs shall abide the event, was established in equity; for frequently the most painful and anxious duty of a Judge in this Court is to execute well the judgment as to costs; depending more upon discretion than the merits; with reference to which the rules of law and the principles of equity guide you with much more certainty. But that has not been so decided in equity, and I should be sorry to see the rule of this Court altered; from the circumstance of making persons answer large sums in costs, where the demand, which is the object of the suit, is very small. As to the question of costs upon a suit in equity for the specific performance of an agreement, if there is any rule, that the person who fails shall pay costs, it is new to me. I think, in such a suit he, who fails, is *primâ facie* to be taken to be the person liable to costs, upon principles both of morality and justice; and those parties who

2. We have already considered (Chaps. 12, 27,) the nature and extent of the vendor's obligation to make a *good title*, and the right of the vendee to object to a title, as being merely *doubtful*. (a) In the present connection it may be added, upon the same subject, that a party will not be charged with expenses arising from objections made to a doubtful title. Thus it is held, that a purchaser brought

depend upon circumstances to govern the discretion of the Court in withholding the costs, have it imposed upon them to show the existence of those circumstances in a sufficient degree to cut down the *primâ facie* claim of costs."

(a) In *Marlow v. Smith*, 2 P. Wms. 201, the Master of the Rolls says: "There being the opinion of learned men against the title, I will not, nor do I think it reasonable that a Court of Equity should compel the purchaser to accept the purchase."

But in *Vancouver v. Bliss*, 11 Ves. 464, Lord Eldon expresses the following views upon the same subject: "In the case of *Shapland v. Smith*, (1 Bro. 75,) the single question was, whether there was a use executed or not; and the case sunk down into this state; that with so much difficulty upon the title a purchaser should not be compelled to take it. That case has been followed since. What is the consequence? It is scarcely possible to represent the difficulties that have arisen from it; especially in a period when persons under the description of land-jobbers, are going about, looking for these things; and persons improvidently enter into contracts with them. Whenever a contract is made for the purchase of land, though no doubt has ever been entertained upon the title, no one thinking of disputing it, if the purchaser has a good bargain, he overlooks all these objections; but, if he finds he cannot sell the estate as well as he wished, or cannot enjoy it to his satisfaction, the first thing is, that the abstract goes to some one for the express purpose of finding out objections and opinions are given on both sides."

The question of costs has been made to depend upon the general fairness and honesty of the party from whom they are claimed. Thus, in the case of *Davis v. Symonds*, (1 Cox, 402,) Hotham, Baron, says: "If the parol evidence is once received, there is an end of the cause; for upon that it appears the plaintiff is not an honest man, and there is consequently no reason for us to interpose; and if his conduct be such, he must pay the costs."

A vendor not making a good title was ordered to pay costs, though he was only a trustee to sell. *Edwards v. Harvey*, Coop. 40.

into Court upon a doubtful title ought to be discharged with costs. Lord Redesdale says: "It is sufficient, on the question now before the House, if the law be doubtful. A purchaser has a right to require a marketable title; and this title, it must be admitted, rests on a point of law which at least, is doubtful. This being so, the purchaser who has been obliged to keep his money in readiness, and deprived of the opportunity of vesting it in another purchase, has been hardly used, and is entitled to his costs."¹ So, in the case of *Sloper v. Fish*,² Sir William Grant, M. R., says: "It has been said, that every title is good or bad; and the Court ought to know nothing of a doubtful title; but the Court has adopted a different principle of decision. It was not first introduced by Lord Thurlow, but is at least as old as Sir Joseph Jekyll's time, and was repeatedly acted upon by Lord Hardwicke. And accordingly a reconveyance afterwards directed, paying the purchaser all his costs."

3. If, after a sale, but before the title is accepted, the title-deeds be destroyed by fire, equity will not compel specific performance, unless the vendor can furnish the means of showing their contents, due execution and delivery. For want of such proof, a vendor's bill was dismissed, with costs.³

4. In an abstract of a vendor's title, a will which formed part of it was wrongly represented as having been proved in the Spiritual Court. The purchaser filed his bill, praying that the defendants might either be decreed to prove the will, or that it might be deposited in the hands of the Master for safe custody. The vendors, having by their misrepresentations occasioned the suit, were ordered to pay all the costs.⁴

5. Upon a bill filed by a vendor for specific performance, it appeared that he could make a good title before commencement of suit, but did not show one to the purchaser

¹ *Blosse v. Clanmorris*, 3 Bligh. 62, 71.

² 2 Ves. & B. 149.

³ *Bryant v. Busk*, 4 Russ. 1.

⁴ *Harrison v. Coppard*, 2 Cox, 318; *Sloper v. Fish*, 2 Ves. & B. 145.

until afterwards. Held, though specific performance must be decreed, the purchaser was entitled to the costs of the suit, generally.¹ So costs were allowed to a purchaser; the vendor having established his title before the Master, after contest, upon a different ground from that in the abstract delivered.² So it is held, that a vendor seeking specific performance should have his title prepared, and therefore, where the abstract delivered is imperfect, he pays the costs up to the time of supplying the defects. The Master of the Rolls said: "I cannot say that the defendant in this case has acted quite right, that he has not taken some objections that he ought not; but still I should feel great difficulty in fixing him with costs. A vendor who seeks a specific performance should come prepared with his title; he ought to have it ready before he carries his estate to market. If he will sell it with a confused title, he must be at the expense of clearing it. The plaintiff here comes into the office with an abstract undoubtedly imperfect, for it did not state that part of the land was copyhold; proceedings then follow at a great expense, occasioned by the plaintiff's neglect. It gradually ripens into a better title; the time that elapsed during the inquiry improves it. The deeds did not on the face of them make out the title as they failed to identify the premises. Affidavits are then filed, which were not originally before the Master, and which were not before the defendant when he first resisted. Why was not this done before the commencement of the suit, or why was it not provided for in the contract? We cannot now characterize the objections first taken as frivolous, and though they have been removed, it was not by any thing that was in the defendant's knowledge at the time he put in his answer."³

6. Where a purchaser is ready to pay, but the vendor refuses to convey, the vendor, upon a decree for specific performance, shall be charged with costs.⁴

¹ *Townsend v. Champenowne*, 3 Y. & Coll. 505.

² *Fielder v. Higginson*, 3 Ves. & B. 142.

³ *Wilson v. Allen*, 1 Jac. & Walk. 623.

⁴ *Hart v. Brand*, 1 A. K. Marsh. 159.

7. So, if a purchaser attends at the time and place appointed for making the conveyance, and the vendor is unable to make a good title, the vendor will be chargeable with the costs of a suit for specific performance subsequently commenced by him, though he makes a title at the time of the decree.¹

8. A vendor, on delivering the deed, promised to procure a release of dower; but the release was delayed till after the filing of a bill to enjoin collection of the purchase-money. Held, upon dissolution of the injunction, no damages should be decreed, but the purchaser was entitled to costs.²

9. Before completion of a purchase, the purchaser died intestate. A bill was filed by the vendor against the heir and administrator of the vendee, praying for a resale, and for the application of the purchase-money to the payment of the vendor's expenses and the sum agreed to be paid by the vendee. Held, that the vendor was bound to pay the costs of the heir, with liberty to add them to his own.³

10. A purchaser demurred to a bill against him for specific performance, and his demurrer was overruled. He then asked for a case to be sent to a Court of Law, which was granted; and the opinion of the Judges was also against him. Ultimately, however, the bill was dismissed, with costs. Held, he was entitled to his costs at law, as well as in equity. "The Vice-Chancellor said that neither party was wrong in asking for the opinion of a Court of Law upon a mere question of law; and that the costs of the case were part of the costs of the cause, incurred with a view to the final termination of the suit." Order appealed from.⁴

11. Sale of land to a railway company. The vendor died before any conveyance, leaving an infant heir; and the company then instituted this suit, to obtain a conveyance from the infant. Held, although the company were bound by their act to pay the expenses of the conveyance of land

¹ *Winne v. Reynolds*, 6 Paige, 407.

² *M'Koy v. Chiles*, 5 Mon. 259.

³ *Popple v. Henson*, 9 Eng. L. & Eq. 215.

⁴ *Forbes v. Peacock*, 12 Sim. 549.

taken by them, yet, as the vendor had occasioned the suit by suffering the land to descend to an infant, the costs of the suit, and of having the conveyance settled by the Master, must be paid out of the purchase-money. The Vice-Chancellor said: "If the defendant's father, instead of allowing the piece of land to descend to an infant, had taken only the ordinary precaution of devising it either to his executors or to a trustee in trust to convey it to the plaintiff, there would have been no occasion for instituting this suit; and as he has created the necessity for the suit, by his own laches, the costs of it must come out of the purchase-money. The expense of the actual conveyance must be borne by the company; but, if it is necessary that it should be settled by the Master, the extra expense occasioned thereby, as well as the costs of the suit, must be paid out of the purchase-money."¹

12. Questions have often arisen, as to the liability of a *vendee* for costs.² Thus, in case of a bill filed by a vendor for specific performance; the purchaser, having ineffectually claimed that the contract had been abandoned, was ordered to pay the costs of the suit up to the hearing; and the usual reference made as to title.³ So specific performance was decreed, with costs, against a purchaser, without reference as to the title, upon possession, and no objection made to the abstract.⁴ So upon possession, a correspondence, and no objection to the title till two years after the abstract was delivered.⁵

13. A purchaser had been eight years in possession, but the vendor was unable to make a good title, and the purchaser refused either to abandon the agreement or accept such title as the vendor could give, but paid no purchase-money or rent. The Court, upon a bill filed by the vendor for relief, directed the agreement to be delivered up to be

¹ *Midland, &c. v. Westcomb*, 11 Sim. 57, 58.

² See *Nicloson v. Wordsworth*, 2 Swanst. 365.

³ *Taylor v. Brown*, 2 Beav. 280.

⁴ *Fleetwood v. Green*, 15 Ves. 594.

⁵ *Margravine, &c. v. Noel*, 1 Madd. 310.

cancelled, and the rents and profits received by the purchaser to be accounted for, and ordered the purchaser to pay the costs.¹

14. A sale was to be void, if the purchaser's counsel should be of opinion that a marketable title could not be made by a certain time. The counsel being of that opinion, a bill by the purchaser for a specific performance, with a compensation, was dismissed with costs; and an application afterwards made by the plaintiff, that his deposit might be set off against the defendant's costs, and the surplus (if any) paid to him, was refused with costs.²

15. But although, in general, possession of a vendee will have weight in favor of the vendor upon the question of costs, in case of a bill by a vendor for a specific performance, the report being against the title, the bill was dismissed, with costs, upon the circumstances of the case, the purchaser having taken possession at the instance of the vendor, representing the title to be perfect.³

16. Where the purchaser objects to specific performance upon other grounds than those of title, and fails, and the vendor does not make out his title until after decree; the purchaser is liable to the costs of the vendor's suit for specific performance, except the costs of making out the title.⁴

17. Where, on a bill for exhibition of title, a deed is tendered and finally accepted, the party having a right to an injunction at the time of filing his bill should pay only the costs subsequent to such acceptance.⁵

18. Where specific performance of a contract by the ancestor is decreed against the heir, to whom nothing has descended except the property in question; the costs will be charged upon the plaintiff.⁶

19. Contract with a person, since deceased, for the purchase of an advowson; but no steps were taken to enforce

¹ *King v King*, 1 My. & Kee. 442.

² *Williams v. Edwards*, 2 Sim. 78.

³ *Vancouver v. Bliss*, 11 Ves. 458.

⁴ *Abbott v. Calton*, 19 Eng. L. & Eq. 601.

⁵ *Noland v. Pope*, 7 J. J. Marsh. 138.

⁶ *Sutphen v. Fowler*, 9 Paige, 280.

the contract during the life of the vendor, or for a considerable time after her death, the vendee objecting to the title, on the ground of outstanding judgments, and a creditor's bill pending. Held, the vendee is not entitled, as against a devisee, to present, if a vacancy occur in the mean time, though he has not renounced his contract, but insists on having it completed. And if, in consequence of his insisting on such right, a bill becomes necessary to ascertain the true claim of the next presentation, which is thereby put in danger of lapse; a decree in favor of the plaintiff will carry costs as far as his claim came in question, although it be part of the decree, that, subject to the next presentation, he be permitted to complete his contract. Thomson, C. B., says: "The defendant, having insisted on his agreement, and having asserted in plain terms his right of presentation, he by so doing, has rendered the present suit on the part of the plaintiff necessary, and the Court have eventually decreed that his claim was ill founded. Therefore, as far as relates to the advowson, he ought to pay the costs." Graham, B., says: "The conduct of Tucker must be construed into a refusal to accept the title, unless sanctioned by the decree of the Court; and yet, had he not insisted on his claim, this suit would not have been necessary." Richards, B., says: "The contract is somewhat like an agreement for the purchase of a reversion, in which case, if the purchaser were allowed to delay the completion of the contract the object of it would increase in value hour after hour. The Court having decided against him, *primâ facie* the costs follow that decision; and then the question arises, whether he has in fact made a suit necessary. Now his delay was the sole cause of it, and his subsequent conduct shows that his excuse was not sincere, and that he had never any solid objection to the title, but had other interested motives." ¹

20. Although, as has been seen, the usual practice in equity now is, to allow costs to the prevailing party, a con-

¹ Wyville v. Bishop of Exeter, 1 Price, 292, 297.

trary doctrine has, sometimes, heretofore prevailed. Thus a bill by a purchaser for specific performance was ordered to be dismissed for defect of title, a necessary party not choosing to concur in conveying. But the order was made to dismiss without costs, it being against the principles of the Court to order the defendant to pay the plaintiff his costs.¹

21. As has been already suggested, (s. 2,) in equity costs do not follow the event of the suit, where a fair question is raised. (a) Lord Eldon remarks: "The question I have to decide is, not whether the conduct of either party was right or wrong, &c., but whether there was a fair ground for dispute. As to the costs of the suit in equity, it is in many cases very hard, that costs should follow the event of the cause; yet all my experience has persuaded me, that it is much to be wished that the course of the Court was so. Certainly, however, that is not the present course of the Court. Where there is a fair case for consideration, it is not the course to visit the party who fails with costs. Upon the question in this cause, which I separate from all questions upon the propriety of previous conduct, my opinion has never fluctuated; but, the Master having expressed his opinion that this covenant ought not to have been inserted, and considering what passed at law, that the Judges would not decide the case, until they had the opinion of this Court, and that professional men have differed upon the question, it would be too presumptuous in me to set such a value upon my own opinion by marking the resistance of the defendant with costs."²

¹ *Lewis v. Loxham*, 3 Mer. 429.

² *Staines v. Morris*, 1 Ves. & B. 8, 15;
Cox v. Chamberlain, 4 Ves. 631.

(a) In *Campbell v. Home*, 1 You. & Coll. 670, where the losing party had been in fault, the Vice-Chancellor said: "Considering the line of defence taken by the answer, and the quantity of irrelevant matter into which the defendant has travelled; and considering also the absence of any ground for the objection which has been brought forward against this appointment, it is impossible for me to give Colonel Home his costs. I do not, however, think it necessary to fix him with costs."

22. Specific performance was decreed without costs, the abstract delivered not containing a satisfactory title.¹

23. Upon a bill for specific performance by a vendee, who tenders the price, but fails to bring it into Court, the plaintiff, though he prevails, is not entitled to costs.²

24. The father of the plaintiff purchased land, paid for it, and continued in possession thirty years, till his death, but never received a deed. The plaintiff files his bill against the defendant, a devisee of the vendor, for a deed. Decree for a conveyance, but without costs.³

25. On a decree for specific performance against the infant heir of a vendor, the Court, where there has been no default on either side, will give no costs on either side.⁴

26. A bill, for specific performance of a contract to make a lease to the defendant, was dismissed without costs; the plaintiff having after answer given a notice to quit, according to a proviso for determining the lease.⁵

27. A. contracted to sell to B., but, at the request of B., (who intended to build, and sell in lots,) the conveyance was delayed. In the mean time A. died intestate, and a bill became necessary for the completion of the contract. Held, that the costs of the suit, which was rendered necessary by the intestacy of A., ought not to be thrown on his estate. Turner, V. C., says: "The cases on the subject stand thus: Sir L. Shadwell has decided, that, if a vendor dies, not having demised the legal estate to trustees to complete the sale, his estate must bear the costs of a suit by the purchaser to obtain a conveyance. Sir J. L. Knight Bruce, V. C., on the other hand, has decided, that, if there be no default on either side, there ought to be no costs given. In this difference of opinion, I prefer to follow the latter decision, especially as in this case the non-completion and the non-execution of a conveyance was for the convenience of the purchaser himself. I cannot make the estate of a party pay costs merely

¹ Wilson v. Clapham, 1 Jac. & W. 36.

² Galloway v. Barr, 12 Ohio, 354.

³ Frobock v. Edwards, 2 Hay. 361.

⁴ Hanson v. Lake, 2 Y. & Coll. 328.

⁵ Western v. Perrin, 3 Ves. & B. 197.

because he has, by the act of God, become unable to execute the conveyance."¹

28. If, during the pendency of a bill for an injunction to a judgment for the purchase-money, and for the rescission of the purchase, on the ground of an incumbrance and a defect of title, the vendor removes the incumbrance and procures the title; the injunction will be dissolved, with costs to the plaintiff, but without damages. But, if the plaintiff had another case depending, involving the same questions, where he could have had the relief asked for, by a proceeding in that case, he will not be allowed his costs.²

29. Specific performance was decreed without costs, the suit being occasioned by the vendor's refusal to produce documents insisted on by the purchaser, some of which were necessary, and others not.³ So a decree was rendered for specific performance, without costs to the plaintiff, the vendor; the title, though established before the Master, not being clear upon the abstract.⁴ So, upon a late decision of the Court of Exchequer, that a presumption, from non-payment of tithes, cannot bar even a lay impropriator, the Lord Chancellor, though holding the contrary opinion, would not compel a purchaser to take such a title; and dismissed the bill against him for a specific performance, but without costs.⁵ So a lessee's bill for specific performance was dismissed; his interest, described as fifty years, the residue of a term, free from incumbrances, being a few years only of an old term, and a reversionary term, from another lessor; and old incumbrances not being shown to be discharged; but without costs.⁶ So, where in a suit by a vendor for specific performance, the Master reported in favor of the title, but the Court, on an exception taken by the purchaser, deemed the title doubtful; an order was made, dismissing the bill without costs, but neither allowing nor disallowing

¹ *Hinder v. Streeter*, 12 Eng. L. & Eq. 345.

² *Young v. McClung*, 9 Gratt. 336.

³ *Newall v. Smith*, 1 Jac. & W. 263.

⁴ *Collinge's case*, 3 Ves. & B. 143, n.

⁵ *Rose v. Calland*, 5 Ves. 186.

⁶ *White v. Foljambe*, 11 Ves. 337.

the exception.¹ So, on dismissing a bill by the heir and executor of a purchaser, to have a good title made by the vendor, and to restrain collection of the purchase-money till such title be made ; costs should not be decreed against the plaintiffs jointly, nor against the executor *de bonis propriis*.²

30. Where a sale was vacated, on account of the negligence of the solicitor and Master in describing the property, costs were refused to them on the motion to discharge the purchasers, and for a resale. The Vice-Chancellor said : " The infants, to whom the money in this case belongs, have been seriously prejudiced by the resale. The Court was obliged to relieve the former purchaser, because of the loose manner in which the property had been put up and sold. This was the fault of both solicitor and Master. The description of the property, as given in the mortgage and in the decree, speaking as it does of a party wall, was sufficient to have put them on inquiry as to how the property should be sold with reference to party walls or other circumstances which might affect the sale ; and yet no inquiries were made and no heed taken of the fact, leaving the purchasers in the dark and to find out afterwards that they had been misled. Under these circumstances, I think the solicitor for the complainant must forego his costs on the motion to discharge the purchasers, and of the order for a resale ; and that the Master must, also, be content to receive the costs and expenses of only once advertising and selling the property."³

31. The costs of suit are in some cases *divided* between the parties. Thus, in a case of specific performance, the Court in New York remark : " Although the complainants succeed in this suit, it does not necessarily follow that they are entitled to costs against the defendants. They furnished no abstract of title previous to filing the bill. At that time too there was a judgment outstanding, which was apparently an incumbrance, and which they took no steps to remove,

¹ Wilcox v. Bellaers, Turn. & R. 491.

² Long v. Israel, 9 Leigh, 556.

³ Walworth v. Anderson, 4 Edw. Ch. 281.

though they offered to leave enough of the purchase-money to cover the amount. The defendants were excusable in standing out until the title could be investigated, and under the circumstances they ought not to be made to pay the costs of the suit. Nor do I think the defendants are entitled to costs against the complainants. The fairest ground on which to put it is that both parties have, in some degree, been in the wrong; and as to the costs of the suit generally, each party should bear their own. The defendants, however, should not have taken exception to the Master's report, and the costs consequent on this step the defendants must pay."¹

32. Suit for specific performance by vendor against purchaser. The Master reported, that a good title was first shown pending the reference, except as to a small portion, which the Court regarded as a subject for compensation. Held, the defendant should have costs to the time of amending the bill, and the plaintiff afterwards.²

33. In a late English case,³ the Master of the Rolls said: "With respect to the costs of the suit, I must look to the general conduct of the parties; and I cannot consider this as a suit occasioned simply by a question respecting the payment of interest, or decide because the amount of interest has been determined to be less than the plaintiffs claimed on the one hand, but larger than the defendant contended ought to be given on the other, that I ought to divide the costs of the suit. The contract was entered into on the 30th of November, 1843, and no deposit was paid; it was waived, and the contract under which the parties acted may be said to bear date the 30th of January, 1844. It is impossible to look at the proceedings of Mr. Mousley throughout this business without seeing (whatever may have been the cause) that there have been a fighting and fencing off the completion of this contract; and my conviction upon

¹ *Scott v. Thorp*, 4 Edw. Ch. 1, 4.

³ *Sherwin v. Shakspeare*, 23 Eng.

² *Freern v. Hesse*, 17 Eng. L. & Eq. 206.
154.

the evidence is, that if this bill had not been filed, it would not have been completed up to this time. The delay without doubt has been occasioned by the conduct of the defendant's adviser; the plaintiffs, therefore, ought not to bear the expense, and, consequently, they must necessarily be borne by the defendant."

34. In a late case,¹ the costs were divided, in consideration of the nature of the several objections made by the defendant to the plaintiff's claim; the character of which appears from the opinion of the Court. Wood, V. C., says: "The contest in some degree arose upon the question of conveyance, which was still unsettled; and there was reason to suppose that this question might possibly have been settled. But when the claim was filed, other objections were raised by the defendant to the specific performance of the agreement, and the defendant objected to complete at all, and contended that he was not bound to take the plaintiff's title. The question of title had then passed, and the only question was, as to the conveyance to be made by the plaintiff. If at the hearing the defendant had said that he only objected to the form of the conveyance, a decree might have been made to settle the conveyance, and the costs of the suit would have followed the result. But the question now raised was, in fact, that there was not any contract. This question was paramount to that of title, and if a question was raised prior to the question of title, the vendor would not be called upon to perfect his title, and the costs of establishing the prior question would fall upon the party who failed. The defendant has taken his chance of success upon the prior ground, and, having failed, must pay the costs of the suit, except the costs of the exceptions and of the affidavits aduced by the plaintiff in support of his title."

35. The question of costs has often arisen in connection with an inquiry into the title, upon a *reference to the Master*. (a)

¹ Abbot v. Calton, 19 Eng. 602.

(a) The Master's decision on questions of taxation is final as to matters of

36. The fact, that a title has been perfected in the Master's office, does not determine the question of costs in a suit for specific performance. This depends upon the consideration, whether the defects removed there were the occasion of the suit. The Master of the Rolls says: "The purchaser takes a reference to the Master to inquire into the title, and then raises all possible objections to the title, most of which, however, were overruled; one of them related to a mortgage mentioned in a deed of upwards of one hundred years old, which had not since been heard of; the vendor contended that the mortgage term must be presumed to have been satisfied, but, upon search, an old deed of reconveyance was found. This fact was relied on by the defendant, as showing that a good title had not been previously made out; but, because new evidence was brought forward in the Master's office by the vendor, must it necessarily be taken for granted that a good title had not previously been made out, and must the vendor, on that account, pay the costs? To establish such a rule would be most prejudicial, not only to a vendor but to a purchaser; for the vendor would thereby be deterred from bringing forward any new evidence in the Master's office in confirmation of his title, for fear of rendering himself liable to pay the costs of the suit."¹

37. A purchaser declined to perform the contract, on the ground of inadequacy of value. In a suit by the vendor for specific performance, by a decree, dated April, 1851, it was declared that he was entitled to such performance, and a

¹ *Scoones v. Morrell*, 1 Beav. 251, 257.

fact, and amount of charges, and is only reviewed by the Court, when he acts upon a mistaken principle; and, if the solicitor negligently or ignorantly takes some unnecessary proceeding, it is the duty of the Master to disallow the charge made in respect of such proceeding. *Alsop v. Oxford*, 1 Myl. & Kee. 564.

Where a Master's report is against the title, a vendor's bill may be dismissed with costs upon motion. *Bennet College v. Carey*, 3 Bro. C. C. 390.

reference was made to the Master, to inquire whether the plaintiff could make a good title, and, if so, to state when such good title was first shown; and costs were reserved. The Master found that a good title was made, and that it was first shown in April, 1852. Held, the plaintiff was entitled to the costs of reference. Parker, V. C., says: "The investigation of the title seems to have proceeded up to a certain point, and then the defendant insisted that the contract was not binding on him for a certain reason; and, thereupon, the further investigation of the title stopped, and the plaintiff filed his bill to enforce specific performance of the contract, and obtained a decree. I entertain no doubt that a plaintiff, getting a decree for specific performance, is entitled to the general costs of the suit; and the only question is, as to the costs of the reference as to title. The rule of the Court is very clear as to this. When the parties have a dispute as to the title, and the question of specific performance turns on it, the Court, if it finds that the plaintiff was in the wrong when he filed the bill, considers that fact in disposing of the costs of the suit, and sometimes makes a decree for specific performance only on the terms of his paying the costs, because he was in the wrong when the bill was filed. This case, however, does not belong to that class. Here the reason for refusing to complete was a question on the validity of the contract. According to the case of *Croome v. Lediard*, the general rule would entitle the plaintiff to the costs of the reference as well as to the general costs of the suit. The plaintiff was under a condition to make out a good title, which he would have done at his own expense if there had been no suit instituted. I think that the defendant has brought upon himself the costs occasioned by having the title investigated in the Master's office. The only doubt which I have is occasioned by the direction in the decree, which seems to be in some degree inconsistent with that view. By the decree it was referred to the Master to inquire when a good title was first shown. I think, how-

ever, that I am not bound by the form of the decree in this case to depart from the general rule that, where the purchaser's conduct had led to the institution of the suit, he is to pay the costs before the Master."¹

38. A vendor filed a bill for specific performance, alleging that the defendant had accepted the title; but the defendant resisted it, on the ground that the bankruptcy under which the plaintiff claimed was invalid. Neither allegation turned out correct; and, though a good title was first shown in the Master's office, a decree for specific performance was made, without costs. The Master of the Rolls says: "If the plaintiff in this bill had proceeded on this allegation: 'I have entered into a contract, and am ready to perform it, and you refuse,' and the defendant had answered, 'I admit the contract and am willing to perform it, but you cannot make a good title without the concurrence of the assignee of the insolvency, which you refuse to obtain;' if that had been the only question in litigation, and a good title, *i. e.* in the case supposed, the concurrence of the assignee, had been first shown in the Master's office, then the plaintiff would have had to pay the costs of the suit. That is the general rule, but it is not a rule applicable to every case whatever; it is subject to a variety of modifications arising out of the particular circumstances of each case. Here both parties made erroneous allegations, the plaintiff alleged that the defendant had accepted the title; the defendant that a good title could not be made because the *fiat* was invalid. The real question never occurred to either party until a very late period in the cause. I think, under the circumstances, I cannot give costs to either side."²

39. By the same instrument, the plaintiff agreed to sell an estate to the defendant, and the defendant another estate to the plaintiff. The defendant, being unable to make a good title, unsuccessfully resisted performance of his agreement to

¹ Abbott v. Sworder, 15 Eng. L. & Eq. 446.

² Sidebotham v. Barrington, 5 Beav. 261, 262.

purchase the plaintiff's estate, on the ground that the agreement was intended to take effect, only on the basis of a mutual exchange. On a reference of the plaintiff's title, the Master found that the plaintiff could make a good title, but not that he could make such title before the filing of the bill, the consideration of time having been expressly excluded, at the hearing, from the terms of reference. Held, the defendant was liable to the costs of investigating the title in the Master's office.¹

40. A bill prayed specific performance, "if a good title could be made." At the hearing, it was declared that the agreement ought to be specifically performed, and referred to the Master to inquire, whether a good title could be made. The Master reported in the negative. The plaintiff, on further directions, waived all objections to the title, and proposed to take the property; but this was resisted by the vendor. Held, the plaintiff was entitled to the property, but, being aware at the first hearing of the objections to the title, he ought to pay the costs of the investigation in the Master's office.²

41. In a suit for specific performance by a vendor, the costs will be thrown upon the purchaser, though the Master reports that a good title was not shown till after the filing of the bill; if that finding proceeded on the ground, that certain evidence had not been previously furnished, which the vendor had offered to produce, but which had not been actually produced, before the institution of the suit, in consequence of the purchaser's insisting upon other unsubstantial objections.³

42. The question sometimes arises, as to the right of a party who has been compelled to pay costs to recover them back from other parties.

43. Where an auctioneer has sold an estate, the title of which being objected to, and he refusing to return the de-

¹ *Croome v. Lediard*, 2 My. & Kee. 293.

² *Bennett v. Fowler*, 2 Beav. 302.

³ *Long v. Collier*, 4 Russ. 269.

posit, an action is brought, in which he afterwards pays the costs; the auctioneer cannot recover these costs against the principal in an action for money paid to his use, but must declare specially.¹

44. A bill for specific performance was made necessary, by a trustee's refusing to join in the conveyance. The Court being of opinion, that the trustee ought to pay all the costs of the suit, the decree was, that the plaintiff should pay the costs of all the other defendants, (although he had a decree against them,) and recover over the whole costs from the defendant, the trustee.²

45. In connection with the subject of this chapter, may be considered the mutual claims of vendor and vendee for incidental expenses connected with the sale, not strictly coming under the denomination of costs.

46. An act, which enabled a company to purchase and take land for making a railway, provided that the costs of the "contracts, sales, and conveyances" should be borne by the purchasers. Held, the vendors of land were, under these words, entitled to be reimbursed the costs of making out their title.³ (a)

47. Construction of a contract, that a reference of the expenses was confined to the expense of the conveyance, but the evidence of the attorney was admitted for the defendant, to prove the intention of both parties, according to verbal instructions, that the plaintiff, the purchaser, should also pay the expense of making out the defendant's title.⁴

48. Where title-deeds are in the hands of persons residing

¹ *Spurrier v. Elderton*, 5 Esp. Ca. 1.

² *Jones v. Lewis*, 1 Cox, 199.

³ *Addies Charity*, 3 Hare, 22.

⁴ *Ramsbottom v. Gosdon*, 1 Ves. & Beam. 165.

(a) So, where the company are made liable to the expenses of "all purchases" to be made by virtue of the act, this will include the expenses of investing the money in the funds, previously to its being laid out in lands, to be settled to the like uses as the land purchased. *Bishop of Durham*, 3 You. & Coll. 690.

in different parts of the country, the vendor must bear the expense of the purchaser's sending a clerk to compare the abstract with the deeds.¹

49. A purchaser at auction cannot recover from the vendor the expenses of preparing the deeds, after he has refused to complete the purchase, on account of the non-production of certain title-deeds; though his attorney prepared the conveyances, on the faith of a note written in the margin of the abstract by the vendor's solicitors, stating that all the title-deeds were examined by them on the original purchase, and that, if it should be required, they would apply to the solicitor for the original seller in whose custody they were.²

¹ *Hughes v. Wynne*, 8 Sim. 85.

² *Jarmain v. Egelstone*, 5 Carr. & Pay. 172.

CHAPTER XXXVIII.

PARTIES TO ACTIONS.

1. WE have already (Chap. 5,) considered the necessity, and the respective rights and liabilities, of *parties* to the contract of sale and purchase. Having now completed our view of the *remedies* in equity and law for breach of such contract, and the measure and amount of compensation to be recovered; we proceed to some further inquiries connected with the same general subject, but more particularly relating to *the forms of proceeding*. Among the most important points of this nature, is that of the proper *parties to a suit*, brought in law or equity by either the vendor or the vendee upon the contract of sale. (a)

2. To a common bill for specific performance of a sale, *the parties to the contract* are the only proper parties. Upon

(a) Upon the point, who may be considered a *party* to the suit, it has been held, with reference to a claim concerning a *deposit*, that a *defendant* is not a *party seeking the aid of the Court*, and therefore is not entitled to an interlocutory order for his own relief or security, as to the subject-matter of a suit, unless as a condition of an order applied for by the plaintiff. The Vice-Chancellor says: "Though a defendant cannot primarily move for any order for his security, because he is not a party seeking the aid of the Court; yet if, at the time of continuing the injunction, he had brought forward this claim as to the deposit, and it appeared to have been just, the Court would have enforced it; not in the nature of relief to him, but as a condition annexed to the relief given to the plaintiff. And although the defendant has neglected the convenient opportunity for the application, yet I think it still open to him, and that I may consider it in principle as a motion to dissolve the injunction, unless the plaintiff pay the money into Court." *Wynne v. Griffith*, 1 Sim. & Stu. 147, 149.

this subject Lord Cottenham remarked: "The contract is, in the usual form, between John Wood, the vendor, and Thomas White, the purchaser; and they alone ought to have been parties to the suit; instead of which, the trustees of Mr. Lucas's settlement, and she and her husband, are made parties co-plaintiffs with the vendor, John Wood. If their concurrence had been necessary to give security to the purchaser, it was for John Wood to bring them forward to assist in giving effect to his contract; but as plaintiffs they have no title to sue. If the infant children of William had been made co-plaintiffs, or if there had been children of Mr. and Mrs. Lucas, and they had been made co-plaintiffs, I should have refused to make any decree in a cause so constituted, because I should have supposed that the object was to attempt to bind the infants in a suit by the proceedings of which they ought not to be bound; but as all the plaintiffs are adults, and the objection has not been taken by the defendant, I do not think it necessary to do more than to observe upon the frame of the suit, that it may not be supposed, by my making a decree in it, to have received any sanction from me."¹

3. But though, in general, none but the signers of the contract ought to be parties to a bill for specific performance; yet a purchaser may, under special circumstances, make other persons interested in the estate defendants.²

4. Separate purchasers of different parcels of the same lot cannot join in a bill against the former owner, to compel the performance of a prior contract for the sale and purchase of such lot, between the former owner and another person, upon the ground that such prior contract has been assigned to one of the complainants, as well in his own behalf as to protect the interests of his co-complainants; where there is nothing beyond the averment in the bill, to show that the purchase or transfer of such contract was for the benefit of all the complainants, or was made at their request, or with their

¹ Wood v. White, 4 Myl. & Cra. 460.

² Tasker v. Small, 6 Sim. 633.

assent. The Court remark, in substance, that persons having distinct claims against another, arising upon separate and independent contracts, cannot join in a bill to enforce such claims; where there is no proof of a common interest in the subject-matter. To allow persons having distinct claims against the same individual to maintain a joint suit against him, merely because the act of one may, if valid, incidentally prove beneficial to the others, might be productive of great oppression and injustice.¹

5. Upon the same ground, a demurrer by a defendant for *multifariousness*, the bill being against several purchasers and others, was allowed. The Vice-Chancellor says: "The estate was vested in the plaintiffs, for the purpose of selling the same; and that part of the estate was accordingly sold in six different lots to six different purchasers, who, with several other persons, are made defendants to this bill. A separate agreement had been entered into with each purchaser. Some of the purchasers have not demurred. The Court is always averse to a multiplicity of suits; but, certainly, a defendant has a right to insist that he is not bound to answer a bill containing several distinct and separate matters relating to individuals with whom he has no concern. A decisive objection to this bill is, that the purchases of the different lots are made by distinct persons, each agreement being separate and distinct. The circumstances attending the sale of one lot may be very different from those relating to other lots; one may have objections, another has not."²

6. Two houses held under one lease were sold in separate lots, and it was stipulated that the purchasers should be parties to each other's assignment. Held, the purchaser of one lot was not a necessary party to a suit for specific performance against the purchaser of the other. The Master of the Rolls says: "If there is to be a specific performance

¹ Wood v. Perry, 1 Barb. 114.

88. See Reyner v. Julian, 2 Dick. 677;

² Brookes v. Whitworth, 1 Madd. 86, Wall v. Northumberland, 2 Austr. 469.

of the contract, the purchaser of lot 2 will be bound to concur in the assignment; but is it necessary that he should be a party to all the litigation between the vendor and the purchaser of lot 1? I think not; besides this, the bill alleges that he is ready to concur. Although it might by possibility become necessary hereafter to compel him to join in the assignment, still I see no reason for making him a party to a suit until that necessity arises."¹ (a)

7. C. contracted, as agent of A. and B., to sell an estate to D., and received a deposit in part-payment of the intended purchase-money. C.'s agency was afterwards denied by A. and B., and D. then filed a bill against A., B., and C., praying a specific performance, or, in the alternative, that C. might be decreed to return the deposit, and to reimburse the plaintiff all the expenses of endeavoring to enforce the contract. Bill dismissed with costs. In this case, upon the general subject of *compensation* in equity, Lord Cottenham said: "I certainly recollect the time at which there was a floating idea in the profession that this Court might award compensation for the injury sustained by the non-performance of a contract, in the event of the primary relief for a specific performance failing."²

¹ Paterson v. Long, 5 Beav. 186, 187. ² Sainsbury v. Jones, 5 Myl. & Cra. 1, 3.

(a) It has been held, that a demurrer will not lie to a bill for being multifarious. But upon the general subject the Court remark: "Each party's case would be distinct, and would depend upon its own peculiar circumstances; and there must have been a distinct bill upon each contract." Rayner v. Julian, 2 Dick. 677.

The case of Bull v. Allen, (Bunb. 69,) was a "bill to be relieved against several contracts entered into by the plaintiff with the defendants, relating to shares in a bubble called the Pennsylvania Bubble, and to have his money repaid, which he had paid to the defendants for shares sold by them respectively; and charges that the defendants had formed themselves into a society to carry on the fraud. The defendants demurred, because the bill contained several and distinct charges against several and distinct defendants; and the demurrer was allowed. *Nota*, they denied combination, as is necessary upon such a demurrer as this."

8. In case of fraud on the part of a vendee, a subsequent conveyance, while the fraudulent vendee is in actual possession, claiming the land, is inoperative; and a suit to set aside the first sale must be brought in the name of the vendor, or of his legal representatives, if he is dead.¹ And, where the vendor is dead, all his heirs should be parties to a bill, to set aside the sale for fraud of the vendee.² So, in a suit demanding the specific performance of a contract, by conveying lands in Ohio, stipulated to be conveyed as the consideration for other lands sold in Kentucky, or, in lieu thereof, requiring indemnification by the payment of money; held, all the co-heirs of the vendor, deceased, ought to be made parties to the bill, or the death of one omitted, to be proved.³

9. To a suit by the personal representative of a vendor for specific performance, his real representative is a necessary party. The Lord Chancellor said: "This was a suit by the administrator of the vendor against the purchaser of an estate for a specific performance of the agreement of sale. The defendant by his answer objected that the heir at law of the vendor ought to have been a party to the suit. It was argued that by the contract the estate was converted into personalty, and that the heir at law had no interest in the matter. But that is to assume the very point in controversy, for the heir at law may dispute the contract and controvert its validity. It was further argued, that, as a general rule, it is not necessary to make parties to the bill those who are not parties to the contract, but that rule does not extend to representatives; and the heir at law is the representative of the vendor as to the realty. The cases which were cited do not apply. The mortgagee, it is said, need not be a party in a suit by the mortgagor. But his interest is not affected by the sale, and on payment of the mortgage-money by the purchaser it entirely ceases. So, as to the cases where the sale is by a person holding the estate under a conveyance or

¹ *Livingston v. Peru, &c.* 2 Paige, 390.

² *Ibid.*

³ *Morgan v. Morgan*, 2 Wheat. 290.

a demise ; the heir at law of the grantor or devisor need not be made a party ; he does not claim through, or in any way represent, the vendor. The purchaser is not to be prejudiced by the death of the vendor, but is entitled to the same benefit from a decree as if it had passed against the vendor himself.”¹

10. Bill by devisees in trust to sell, for specific performance, of an agreement to purchase. Exception to the report in favor of the title, that the persons entitled to the purchase-money, subject to debts, legacies, and other charges, were not parties to the suit. The Lord Chancellor was of opinion that they ought not to be parties to the conveyance ; and, if they were, their covenant ought to extend only to their own acts and those of the devisor ; not to a general warranty, without a special contract for it ; but, as the point must come properly upon objections to the conveyance, the exception was overruled upon the form. He also held, that it was not matter of exception to the report in favor of the title, that the heir of the devisor was not a party to the suit. Lord Loughborough says : “ The scope of the exception is, that these persons are not made parties to the suit. That comes a great deal too late in the cause ; and was an objection to be made at the hearing. It then supports itself by certain hints of objections, which are not made a substantive ground of exception. I cannot allow this without laying down as a general proposition, that all persons interested in the money to arise from the sale ought to be parties to the contract.”²

11. To a bill against a vendor for specific performance, his stewards and receivers ought not to be made parties. And, specific performance being decreed, the bill as against them was dismissed with costs.³

12. The plaintiff agreed to sell to the defendant a piece of land in the occupation of his tenant, and to buy up the

¹ *Roberts v. Marchant*, 1 Phill. 370, 373.

² *Wakeman v. Rutland*, 3 Ves. 233, 234 ; 8 Bro. P. C. 145.

³ *McNamara v. Williams*, 6 Ves. 148.

tenant's interest. The defendant having entered before payment of his purchase-money, the plaintiff and his tenant served him with notices not to trespass; and afterwards the plaintiff filed a bill against the defendant for specific performance and to restrain the trespass. Held, the tenant was not a necessary party to the suit.¹

13. When a bill for specific performance is filed, by a person who has contracted to purchase the absolute legal and equitable interest in a mortgaged estate, from the supposed owner of the equity of redemption, neither the mortgagee, nor a person who claims an interest in the equity of redemption, but has not joined in the contract, can be made a defendant; although the mortgagee does not object to being made a party, but requires the sanction of such claimant before joining in the conveyance.²

14. The general rule, that an action lies only against a party to the contract, is sometimes held inapplicable to one having *notice* of such contract.

15. Bill for specific performance of a contract to sell. Two persons held land in common. One, professing to act for both, contracted by deed, signed by himself alone, to sell a small part of it to the plaintiff, but the other owner refused to sell. Afterwards, the two conveyed the whole to the defendant, who knew of the contract. Decree for the plaintiff. The Court say: "The appellee took possession of the lot of land purchased by him, and made use of it in the mode contemplated when he purchased by opening a race through it. It was said in *Robinett v. Preston*,³ that although a conveyance by one joint tenant of a part of the land might have no legal effect to the prejudice of the co-tenant, yet it would be effectual to pass the interest of the grantor in the tract. And if, upon partition, the share assigned to the co-tenant did not include the part conveyed, the co-tenant would get all he was entitled to, and the grantor could not deny his deed. If, upon a partition, that part of the land described

¹ *Robertson v. Great Western, &c.* 10 Sim. 314.

² *Tasker v. Small*, 3 Myl. & Cra. 63.

³ 2 Rob. R. 277.

by this deed or affected by the water privileges, had been assigned to John T. McKee, he would have been in a condition to have executed his contract, if he would not, in that event, have been estopped by his deed from disturbing his vendee; and his son claiming under his subsequent conveyance with full notice, can occupy no higher ground.”¹

16. Where a contract is entered into for the purchase of an estate by certain persons in their own names, but in fact on their own account, and also as agents for other parties, a bill to rescind the contract may be filed in the names of the agents and the other parties. And, where the partners in a company or partnership are numerous, such bill may be filed by some of the partners, on behalf of themselves and the others, if it is manifestly for the benefit of all that the contract should be rescinded.²

17. The plaintiffs, being interested in certain lands, but having no common legal interest in any portion of them, agreed together to put them up for sale, according to their respective interests, and the lands were so put up, under the direction of their agent, in lots. Each lot was described in a separate paper, containing the conditions of sale, in which it was stipulated that “the vendors” should deliver an abstract of title; that the conveyances should be executed, and the whole purchase-money paid, on a certain day, from which time the purchaser should have possession; and that, if the purchaser should be let into possession before payment of the purchase-money, he should be considered tenant at will to the vendors, and pay interest at the rate of 4 per cent. on the amount of purchase-money, as and for rent. The defendant bought four of the lots under the above conditions, two by auction, and two by private contract. No abstract of title was delivered; but the defendant was let into possession, and held for several years, not paying the purchase-money, and having notice of the arrangement entered into by the plaintiffs for the sale. Held, the plaintiffs could not jointly sue, upon an implied contract by the defendant, to

¹ McKee v. Barley, 11 Gratt. 340, 346. ² Small v. Atwood, Younge, 407.

waive the delivery of an abstract, and perform the condition for payment of 4 per cent. interest as rent. Also, that the plaintiffs could not recover the 4 per cent. in a joint action for use and occupation. Lord Denman, C. J., says: "The undertaking relied upon must result either from the original contract of sale, or from a joint ownership in the plaintiffs and occupation under them. But the contract proved does not support the action, and there is no joint ownership proved." Littledale, J., says: "The remedy was to be sought in equity" (for payment of the 4 per cent. interest). "As to the count for use and occupation, the eighth condition, under which the defendant is said to have occupied, supposes that the vendors shall have performed their part of the previous contract, and provides for the case of default made by the purchaser, after such performance. The law would not imply that the vendee had subjected himself to such a condition by being let into possession while the title remained uncertain. And supposing that the defendant under the circumstances had agreed to be bound by the eighth condition, the action ought not to have been for use and occupation; the declaration should have been special on the contract to pay 4 per cent."¹

18. A *husband* may recover back money laid out by his wife in the purchase of lands, unless he was privy to her bargain or consented to it. Holt, C. J., says: "If articles of agreement are made by a *feme covert* by the order and appointment of her husband, and the money is paid by the wife in pursuance of such agreement; or if the husband (though not privy at the time of the purchase) afterwards consents to it, the property of the money is altered, and the husband cannot maintain *trover*. But if he is not privy to such purchase, nor agrees to it, *trover* will not lie for him against the vendor, who receives his money of his wife."² (a)

¹ *Seaton v. Booth*, 4 Ad. & Ell. 528, 534, 551.

² *Garbrand v. Allen*, 1 Ld. Raym. 224.

(a) Upon the general subject of *parties*, including parties to *contracts* and parties to *actions*, a few miscellaneous points remain to be noticed.

It has been held, that an *infant* cannot sustain a suit for specific performance, because the remedy is not *mutual*. *Flight v. Bolland*, 4 Russ. 298; 2 Story, Eq. s. 751, n. Inasmuch as both the rule and the reason of it are a departure from the general principle, which holds infancy to be a strictly *personal privilege*, and from other analogies of the law, it is desirable to state at length the case upon which the doctrine chiefly rests. In this case, the bill was filed by the plaintiff, as an adult. Upon discovering that he was an infant, the defendant moved that the bill be dismissed with costs against the plaintiff's solicitor; and the plaintiff was then allowed to amend by inserting a next friend. Upon the opening of the case, a preliminary objection was taken, that a bill by an infant could not be sustained. It was argued, in support of the objection, that specific performance cannot be decreed *against* an infant, and if a decree were made as prayed for, the Court could not compel the plaintiff to execute it; that he could not be forced to pay the purchase-money, and, on attaining full age, might repudiate the contract and the suit. On the other side it was argued, that the want of mutuality is not in all cases an objection to specific performance; as in case of a contract by a husband for sale of the wife's land, which the husband and wife may enforce, but which cannot be enforced against either of them. So also a party who has signed an agreement, though himself bound, cannot enforce it against one who has not signed it. Sir John Leach, Master of the Rolls, says: "No case of a bill filed by an infant for the specific performance of a contract made by him has been found in the books. It is not disputed, that it is a general principle of Courts of Equity to interpose only where the remedy is mutual. The plaintiff's counsel principally rely upon a supposed analogy afforded by cases under the Statute of Frauds, where the plaintiff may obtain a decree for specific performance of a contract signed by the defendant, although not signed by the plaintiff. It must be admitted that such now is the settled rule of the Court, although seriously questioned by Lord Redesdale upon the ground of want of mutuality. But these cases are supported, first, because the Statute of Frauds only requires the agreement to be signed by the party to be charged; and next, it is said that the plaintiff, by the act of filing the bill, has made the remedy mutual. Neither of these reasons apply to the case of an infant. The act of filing the bill by his next friend cannot bind him; and my opinion therefore is, that the bill must be dismissed with costs, to be paid by the next friend." But see *Clayton v. Ashdown*, 9 Vin. 393, pl. 1; *Shannon v. Bradstreet*, 1 Sch. & L. 52, 58; 1 Sugd. 282.

Though an infant who has entered into a contract cannot be compelled to complete it, yet he cannot maintain an action to recover back a deposit. *Wilson v. Kearse*, Peake's Add. Cas. 196.

English statutes, not generally in force in this country, have provided for the conveyance of estates purchased, by *infant trustees*.

A vendor dying before the sale was completed, his heir at law, an infant, was declared to be a trustee, within the Statute of the 7th of Queen Anne, and directed to convey. *Smith v. Hibbard*, 2 Dick. 730.

So an infant trustee has been held bound to join in a conveyance within the above statute. Otherwise, where the infant has an interest, or there is a doubt thereof, unless on proper suit. *Hawkins v. Obeen*, 2 Ves. 559.

The Court will not on motion or petition order an infant trustee to convey, unless the trust appear in writing, but will leave the *cestui* to get a decree by bill. *Vernon*, 2 P. Wms. 549.

The statute, enabling infant trustees to convey, extends only to plain and express, not to implied or constructive, trusts. *Goodwyn v. Lister*, 3 P. Wms. 387. The Lord Chancellor says: "There can be no doubt with regard to express trusts by deed, but that an infant, being a mere trustee, may be ordered to convey; and there is no inconvenience in directing an infant to part with an estate, which is of no benefit to him. But the present question is, whether this, being a trust *only by construction of equity*, be within the act; and here I incline strongly to the negative. I cannot think constructive trusts to have been within the view of this Act of Parliament, which does not make provision for infants to convey in pursuance of the decrees of this Court, but only gives power to make orders in a summary way, in cases that are originally plain and uncontroverted by the parties."

A tenant of frank tenement, descendible, agrees to sell, receiving part of the purchase-money. The vendor dies; his heir enters; and the vendee exhibits this bill against him, to have his contract executed. Bill dismissed, upon the ground that the heir is but a special occupant, and does not claim under his father. *Anon.* 2 Freem. 155.

Bill for specific performance. A copyholder covenants with the plaintiffs to surrender to trustees, in trust to sell, and dies before surrender, leaving an infant heir the defendant. The plaintiffs, having agreed to sell the estate, file this bill. Held, the heir was not an infant trustee within 6 Geo. IV. c. 74, and therefore could not be ordered to surrender immediately. Bill dismissed, with costs. *King v. Turner*, 2 Sim. 550. "The Vice-Chancellor said, that he always considered that the Statute of Anne did not apply to constructive trustees; that the late act, 6 Geo. IV. c. 74, did not, as he conceived, apply; that the only distinction was that the late statute extended to infant trustees having an interest, and to cases where there were executory trusts to be performed; that the circumstance of there being a decree did not make any difference; because a decree declaring an infant to be a trustee, must give him a day to show cause, when he came of age, and could only direct him to convey when he should come of age, unless he should show cause against it; a decree, therefore, could not enable the Court to direct him to convey before he came of age, and, therefore, could not make him a trustee within the statute. The consequence was, that the

plaintiffs could not now procure a conveyance, and, therefore, the bill must be dismissed with costs." *Ib.* 551.

The Court refused to declare an infant customary heir of copyhold premises to be a trustee within the Statute of Anne, and to direct him to surrender to one who had purchased from the ancestor for valuable consideration, which was actually paid. So held, on a motion made to confirm a report, which found those facts, and that the infant was a trustee within the 7th of Anne; on the ground that it was an *ex parte* proceeding, and *non constat* that the ancestor was competent to sell. *Ex parte Janaway*, 7 Price, 679.

Where a father and minor son covenant to convey lands on valuable consideration, after the son comes of age the father may be decreed to procure his son to convey. *Anon.* 2 Cha. Ca. 53.

Questions have also arisen as to the rights and duties of *married women*, in reference to the sale or purchase of lands. The point upon which there has been most difference of opinion is, whether a *husband* shall be compelled in equity to execute a contract for the sale and conveyance of his wife's estate. Mr. Sugden (1 Vend. & P. 268) cites the following ancient case from the Year Books, 7 Edw. IV. 14, b.: A woman *cestui que use* and her husband, joined in the sale of her estate; the wife received the money, and she and her husband begged her feoffee to convey the estate to the purchaser, which he accordingly did. The husband died, and then the wife filed a bill against the feoffee for a breach of trust. The cause was heard in the Exchequer Chamber, before the Chancellor and the Judges of both benches, who held, that the sale was in fact the sale of the husband; that the receipt of the money by the wife was immaterial, and the sale was void; that the trustee was answerable for the breach of trust; and as the purchaser knew he was buying a married woman's estate, that the wife might recover the estate from him.

Where a husband and wife, having a joint power of appointment by deed over the wife's estate, agreed in writing to sell it, Sir Thomas Plummer doubted whether specific performance cannot be compelled against them; or whether the Court will decree him to procure her to join. *Martin v. Mitchell*, 2 Jac. & Walk. 425.

Though a person may agree to sell at a price to be fixed by arbitration, and the award can be impeached only upon the grounds affecting all awards, as fraud or gross mistake; yet, upon such an agreement, where some of the persons to be bound were married women, one of whom also had not executed, the Court refused a specific performance, and dismissed the bill, leaving the plaintiff to law. *Emery v. Wase*, 5 Ves. 846. Lord Eldon remarked, upon the *alarming doctrine* apparently sustained by some earlier cases, that specific performance of the wife's contract will be enforced specifically against the husband; that, if a man contracts for the estate of a married woman, he knows the property is hers. The purchaser is bound to



regard the policy of the law ; and what right has he to complain, if she who, according to law, cannot part with her property but by her own free will, takes advantage of the *locus penitentiæ* ; and why is he not to take his chance of damages against the husband.

Baron and feme, having joint power to sell her estate, give authority to an agent to sell by auction ; but he sells by private contract for more than the price they required. The buyer shall not compel specific performance. *Daniel v. Adams*, Amb. 495.

So, in *Outram v. Round*, 4 Vin. Abr., *Baron, &c.*, H. b, pl. 4, Lord Cowper said : “ It is a tender point, to compel the husband by a decree to compel his wife to levy a fine, though there have been some precedents in the Court for it. And it is a great breach upon the wisdom of the law, which secures the wife’s lands from being aliened by the husband, without her free and voluntary consent, to lay a necessity upon the wife to part with her lands, or otherwise to be the cause of her husband’s lying in prison all his days.”

But, on the other hand, in *Hall v. Hardy*, 3 P. Wms. 189, Sir Joseph Jekyll, M. R., said : “ There have been a hundred precedents, where, if the husband for a valuable consideration covenants that the wife shall join with him in a fine, the Court has decreed the husband to do it ; for that he has undertaken it, and must lie by it, if he does not perform it.” And the reason is said to be, (*Winter v. D’Evneux*, 3 P. Wms. 189, n.,) that in all such cases it is to be presumed, that the husband, when he enters into such a covenant, has first gained the wife’s consent.

A husband was decreed to join, and to procure his wife to join, in a conveyance of her estate pursuant to agreement, or to refund a sum received by the husband ; where the Court would not make a personal decree on her. *Sedgwick v. Hargrave*, 2 Ves. 67.

Freeholds were conveyed by lease and release to trustees, to the use of a feme covert, for her separate use for life, or to the use of such person as she should by writing sealed, &c., appoint ; and, in default of appointment, in trust to pay the rents to her for her separate use. The husband and wife, by writing not under seal, for valuable consideration, undertook to execute a mortgage of the property, when required. The husband died, and no mortgage had been executed. Held, the agreement was binding upon the wife. *Stead v. Nelson*, 2 Beav. 245.

A husband covenants in marriage articles, in six months after the death of his mother and his coming in possession of the estate in jointure to settle, &c. He dies in the mother’s life, leaving no issue, and the estate comes to his heir. He shall not be compelled by the wife to a specific performance. *Whitmel v. Farrel*, 1 Ves. 256.

A conveyance to a *bonâ fide* purchaser, under a decree against a feme covert for a sale of part of her separate estate, cannot, after an acquiescence

of twenty-two years, be set aside ; notwithstanding the purchase-money may have been misapplied. So an order, disposing of the real estate of a feme covert, made on her consent, and acquiesced in during her life, will not be set aside on a doubtful case, made many years afterwards, by her representatives. *Burke v. Crosbie*, 1 Ball & B. 489.

By deed of separation, the husband (a trader liable to the bankrupt laws) covenants with a trustee for the wife, in consideration of being indemnified from all debts and engagements which might be contracted by her during the separation, to release his remainder in fee to certain estates, (of which he was tenant for life, remainder to the wife for life, remainder to the issue of the marriage, remainder to himself in fee,) to such uses, &c., as the wife shall by deed or will appoint, with power to the wife to revoke them. The wife executes the power by deed, which she retains in her possession, and afterwards alters and re-executes. Held, *first*, that the covenant, although entered into on occasion of a separation between husband and wife, was yet binding in equity, being made to a third party ; *secondly*, that it might be supported against creditors, under the Statute of James, by the consideration of indemnity against the wife's debts and engagements ; *thirdly*, that, the deed of appointment containing no power of revocation, although it was contained in the instrument creating the original power, the re-execution was void, and the original appointment therefore was decreed to be carried into execution. *Worrall v. Jacob*, 3 Meriv. 268.

An attendant term having become vested in the wife of the owner of the inheritance, as administratrix of the trustee, and her husband becoming bankrupt, his assignees agree to sell the estate, and file a bill for specific performance of the agreement, pending which suit the husband dies. Held, the widow was not entitled to dower, that she was bound to assign the term to the purchaser, and that he was bound to accept the title. *Mole v. Smith*, Jac. 490.

In this connection may be considered some miscellaneous points, connected with the respective rights and duties of *particular tenants*, as growing out of the sale and purchase of lands.

A *tenant in tail* is bound by his agreement to convey. But the issue in tail is not bound. *Ross v. Ross*, 1 Cha. Ca. 171.

Though a decree be made against tenant in tail, who had agreed to sell his estate, and he stands out all process of contempt for not obeying it, yet his issue are not bound by it. *Powell v. Powell*, Prec. Cha. 278.

The ground of these decisions is said to be, that the issue in tail claim *per formam doni*, from the creator or author of the estate tail, not from the tenant in tail, who undertakes to bind them. 1 Sugd. 264.

A *tenant for life*, with a leasing power, agrees to make a lease pursuant to the power. This agreement shall bind the remainder-man. *Shannon v. Bradstreet*, 1 Scho. & Lef. 52.

Where, by the terms of a devise or settlement, the consent of the tenant for life is necessary to a sale by the trustees, upon a bill filed by them to enforce a sale, they must prove the requisite consent before the filing of the bill, not merely before the hearing, in order to obtain an immediate decree at the hearing. *Adams v. Broke*, 1 You. & Coll. 627.

Specific performance of a sale of an estate in fee was decreed, in favor of a vendor who at the time of the contract was tenant for life only; the purchaser not having rejected the purchase as soon as he had ascertained the real interest of the vendor, and the vendor being able, by means of the consent of the remainder-man, to make a good *prima facie* title to the fee simple at the hearing. *Salisbury v. Hatcher*, 2 You. & Coll. 54.

A sale under a decree, all necessary parties being before the Court, will not be set aside after a lapse of time, though the surplus of the purchase-money was directed to be paid to the tenant for life; there being no surplus and the sale appearing to be properly conducted. *Lightburne v. Swift*, 2 Ball & B. 207.

Where a landlord, or lessor, in 1781, by an ejectment for non-payment of rent, entered upon the possession of a widow, tenant for life of a lease for lives renewable forever, remainder to her children, infants; and the children, in 1806, long after they came of age, and after the lessor had been in undisputed possession for upwards of twenty-five years, filed their bill for relief; held by the House of Lords, reversing a decree of the Irish Court of Exchequer, that there was no ground whatever in this case for interference in equity. *Baker v. Morgan*, 2 Dow, 526.

It has been held that, under some circumstances, specific performance of an agreement may be decreed against one since become a *lunatic*. *Owen v. Davies*, 1 Ves. 82.

Upon a bill for specific performance of a contract overreached by a commission of lunacy, the plaintiff not having traversed the inquisition, an issue was directed, whether the defendant was a lunatic at the execution; if so, whether he had lucid intervals, and whether the contract was executed during a lucid interval; the difficulties in executing the contract, which was for the sale of an estate vested in the lunatic, namely, that the price was to be fixed by persons to be nominated, not appearing strong enough to preclude the previous inquiry, with a view to performance; and the plaintiff being willing to take the title. *Hall v. Warren*, 9 Ves. 605.

Upon this subject, Mr. Sugden remarks (1 Vend. & P. 271): "An agreement by a lunatic cannot of course be carried into a specific execution; but the change of condition of a person entering into an agreement by becoming lunatic, will not alter the right of the parties; which will be the same as before, provided they can come at the remedy. As if the legal estate is vested in trustees, a Court of Equity will decree a specific performance; and the act of God will not change the right of the parties; but where the legal estate

was vested in the lunatic himself, that would formerly have prevented the remedy in equity, and left it at law ; unless the purchaser was satisfied with the enjoyment of the estate which a decree would give him, and chose to encounter the inconvenience of leaving the legal estate outstanding in the lunatic, in which case a specific performance would have been decreed in his favor. But this anomaly is now removed by the 1 Will. IV. c. 65, which provides, that where any person has contracted to sell an estate, and afterwards becomes lunatic, and a specific performance of such contract, either wholly or so far as the same remains to be performed, has been decreed either before or after such lunacy, it shall be lawful for the committee, by the direction of the Lord Chancellor, to convey in pursuance of such decree, and the purchase-money, or so much as remains unpaid, is to be paid to the committee."

The relation of *principal and agent* has given rise to some cases, which may be referred to in this connection. (See Chap. 5, § 36.)

A., as the agent of B., the owner of a landed estate, enters into an agreement for the sale of it with C., who appears to act on his own account, but in fact is the agent of D. ; and A. and C. bind themselves in a penalty for the performance of the agreement. Whereupon C. pays A. part of the purchase-money as a deposit. Held, that, upon a breach of the conditions of sale on the part of the vendor, an action for money had and received lies at the suit of D. against B., to recover back the deposit, without proof of the money being paid over by A. to B. *Duke, &c. v. Worthy*, 1 Camp. 337.

On a sale of premises by auction, the memorandum was signed by the auctioneer as agent for the purchaser, and by the vendor's attorney, subscribing himself as "agent of the said S. S.," the vendor. The purchaser paid his deposit to the attorney, who gave a receipt, signed by himself as "agent for S. S." The sale going off through the vendor's default, and the deposit-money not being returned ; held, that the purchaser could not bring an action of money had and received against the attorney, for that he was not a stakeholder, but merely the vendor's agent, and payment of the deposit to him was payment to the vendor. *Bamford v. Shuttleworth*, 11 Ad. & Ell. 926.

One who has made a contract as agent for a third person cannot sue as principal, without giving notice to the defendant, before action brought, that he is the party really interested. *Bickerton v. Burrell*, 5 Mau. & Sel. 383.

Bill by an incorporated railway company for specific performance of a contract for purchase, entered into by their agent. Defence, that it did not appear that the agent was authorized under the corporate seal, and therefore that there was no mutuality. Defence overruled, on the ground that the company had, before the bill was filed, not only acted on the contract by

entering into possession, but actually made a railroad over the land. *London, &c. v. Winter*, 1 Cra. & Phil. 57.

The Court refused to discharge *the solicitor* in the cause from a purchase before the Master, with the view of preventing a sale at an undervalue. *Nelthorpe v. Pennyman*, 14 Ves. 517.

A. purchased for B., but without authority, an estate sold under a decree. B. died without adopting the purchase. The order *nisi* was nevertheless obtained. The Court refused to order B.'s executors to pay the purchase-money, and, on the heir's declining the purchase, discharged the order *nisi*, and directed a resale. It was held that, if the executors of a purchaser under a decree refuse to pay the purchase-money, they cannot be compelled to pay it, unless a suit be instituted by the heir. *Lord v. Lord*, 1 Sim. 503.

CHAPTER XXXIX.

PLEADING.

1. THE *allegations* required by law from the respective parties, in suits relating to the sale and purchase of land, have of course been incidentally referred to, in treating of their mutual rights and obligations; pleading being in truth nothing more than a statement upon the record of those reciprocal agreements and relations, which constitute the claims of such parties on the one side, and the defences against such claims on the other. Only a brief additional notice of the subject is required in the present connection.

2. As has been seen, (Chapters 12, 26, 29,) the question is often raised, how far performance on one side is a condition precedent to a suit for non-performance on the other; as also, how far a tender, or offer, or mere readiness, is equivalent, for this purpose, to actual performance. The authorities upon these points are somewhat contradictory, and it is difficult to draw from them any general rule, not liable to be modified by the circumstances of each particular case. We propose to refer, in this connection, only to those cases, in which these questions arose directly upon the pleadings.

3. In *West v. Emmons*,¹ the defendant covenanted to execute to the plaintiff, on or before a specified day, a deed of certain land, and the plaintiff covenanted that, upon execution of the deed, he would secure the purchase-money by his bond, and a mortgage upon the premises. The purchaser sued the vendor for not conveying according to his agreement, and averred his readiness to execute the bond and

¹ 5 Johns. 179.

mortgage, and that although he had, at the time specified in the agreement, requested the defendant to execute the deed, he had not done so. Upon demurrer to the declaration, it was held, that the averment of the plaintiff's readiness to perform on his part, and that the defendant was requested to execute the deed and had refused, was all that was necessary to maintain the action. (a)

4. But a somewhat different doctrine has been held in other cases.

(a) The same principle is illustrated by some cases relating to personal property.

In *Callonel v. Briggs*, 1 Salk. 102, the agreement was, that the defendant should pay so much money, six months after the bargain, the plaintiff transferring stock. The plaintiff at the same time gave a note to the defendant to transfer the stock, the defendant paying, &c. Holt, Ch. J., says: "If either party would sue upon this agreement, the plaintiff for not paying, or the defendant for not transferring, the one must aver and prove a transfer or a tender, and the other a payment or a tender."

In *Rawson v. Johnson*, 1 E. 208, Lord Kenyon goes into a consideration of the former cases, and remarks as follows: "One man agrees to do a certain act in consideration of another man doing another act; the acts are to be done at the same time and place; one of the parties goes there intending to do his part, and the other stays away altogether; the former is obliged to bring his action for this breach of the agreement, and he pleads according to the truth of the fact, that he was at the time and place appointed, ready to have received the other's goods and to have paid the stipulated price for them, which is all that he was bound to do, and that nobody was there on the part of the defendant, or that the goods were not there ready to be delivered; would it be any answer to say that he ought to have pleaded a tender of the money. Now this case is the same in effect; the defendant undertook to deliver the malt when he should be requested, and the plaintiffs plead that they made the request to him, and were ready and willing to have accepted and paid for it, but that he did not deliver it when requested, or at any other time, but refused so to do. To be sure, under this covenant the plaintiffs must have proved that they were prepared to tender and pay the money if the defendant had been ready to have received it and to have delivered the goods; but it cannot be necessary in order to entitle them to maintain their action that they should have gone through the useless ceremony of laying the money down in order to take it up again." See *Tinney v. Ashley*, 15 Pick. 552; *Thayer v. Turner*, 8 Met. 550; *Thornton v. Wyman*, 12 Wheat. 189.

5. In an agreement for the sale and purchase of land, it was stipulated that \$500 of the price should be paid in cash, \$500 by a note at ninety days with approved indorsement, and the residue secured by bond and mortgage. Held, the agreement was to be executed on both sides at the same time, and neither party could maintain an action without showing performance, or an offer to perform, on his part. An averment of readiness to perform is not sufficient. Harris, J., says: "The plaintiff says he was ready and willing to fulfil his obligations by virtue of the instrument. Assuming that this is a sufficient averment of the fact that, at the day specified, he was ready and willing to pay for the property to be conveyed, according to the terms of his agreement, which is certainly quite as much as the plaintiff can claim for his allegation, there is no averment that he offered to perform the agreement on his part, or that he requested Southwick to convey; or that he gave him notice of his readiness to perform."¹

6. In *Phillips v. Fielding*,² Lord Loughborough, after censuring in very strong terms the length of the declaration, held that it was clearly bad, on both the grounds insisted on in the argument; first, because the plaintiff had not distinctly averred a sufficient performance of his part of the agreement, by stating an actual surrender to the defendant or a tender and refusal; and secondly, because he had not shown *what* title he had to the estate; for whatever his interest was, it ought to have been specially set forth. Gould, J., was of the same opinion. He remembered the case of an indictment for forgery, in which there were three counts for the forgery, and three for the utterance; in the first count the prisoner was particularly described, and the Grand Jury having rejected the three first counts, an objection was raised, that the remaining counts described him "the said A. B." by reference to the first; but all the Judges held, that the description was good, and that the latter counts might refer to the

¹ *Van Schaick v. Winne*, 16 Barb. 89-93.

² 2 H. Bl. 131.

former. So in the present case, the declaration which was swelled to a very improper and unnecessary length, might have referred generally to the conditions of sale set forth in the first count, without repeating them over again in the subsequent counts."

7. Sale by auction of a copyhold estate. It was stipulated that the purchaser should pay down a deposit, and sign an agreement for payment of the remainder of the purchase money at a certain time, on having a good title, and have a proper surrender of the estate, on such payment. In an action brought by the seller, for the non-performance of the conditions, held not sufficient to state, that the plaintiff had been always ready and willing, and frequently offered, to make a good title, and to make a proper surrender on payment of the purchase-money; but it should be averred, that the seller actually made a good title, and surrendered the estate, or that there was a tender and refusal, and also what title the seller had.¹

8. Questions have sometimes arisen, as to the right of one party to the suit to call for a more specific statement of the claim set up by the other.

9. Thus it was held, that the Court will not compel a plaintiff, suing for the breach of an agreement, and assigning by way of special damage that he has incurred certain expenses, to furnish particulars of such special damage.²

10. In an action for money had and received by the purchaser against the vendor to recover the deposit, the conditions of sale not being complied with; the defendant, by a Judge's order, may obtain a particular of the grounds of action to which the plaintiff will be confined at the trial. But, if there has been no particular, the plaintiff may rely upon a breach never before mentioned to the defendant.³

11. In assumpsit for the breach of an agreement to sell an estate, the Court refused to allow the defendant to select

¹ Phillips v. Fielding, 2 H. Blackst. 123.

² Retallick v. Hawkes, 1 Mees. & Wels. 573.

³ Squire v. Tod, 1 Camp. Cas. 293.

certain of several allegations of damage contained in a single count, and pay money into Court on those particular allegations, the whole count taken together being in substance a demand of unliquidated damages. It was said, as the seller had broken his contract, the Court would not help him so as to compel the plaintiff to go to trial at his own risk.¹

12. In *assumpsit* upon a contract for the sale of a house, with counts to recover back the deposit, the plaintiff, having in his first count alleged that the defendant, who was to make a good title, had delivered an abstract which was "insufficient, defective, and objectionable;" the Court obliged the plaintiff to give a particular of all objections to the abstract arising upon matters of fact.² So, in an action for money had and received, brought to recover back the deposit paid to the auctioneer upon the sale of an estate, on the ground of objections to the title, the defendant is entitled to particulars of the objections arising upon matters of fact, but not of objections in point of law. The latter, as Mr. Baron Parke observed, "must find out themselves."³

13. The allegations in the declaration may determine the amount of damages to be recovered by the plaintiff. Thus, in an action by a purchaser against the vendor, the declaration stated that by articles the defendant, in consideration of £2,115, agreed that he would, on or before the 25th day of March next, well and effectually convey the estate to the plaintiff, &c., with a good title; and the plaintiff agreed, that on the said 25th day of March, on having such conveyance, he would pay the defendant the purchase-money; and, in case the purchase should not be completed on that day, would pay interest on the purchase-money before it was completed. Breach, that, although the plaintiff was always, from the making the agreement until and upon the said 25th day of March, ready and willing to accept a conveyance and to pay the purchase-money, whereof the defendant

¹ *Hodges v. Litchfield*, 9 Bing. 713.

³ *Roberts v. Rowlands*, 3 Mees. &

² *Collett v. Thompson*, 3 Bos. & Wels. 543.

Pull. 246.

had notice, &c., yet the defendant did not on the day and year last aforesaid, or at any other time whatsoever, make a good title to the plaintiff of the estate, nor had he at any time any such title, &c.; alleging damage by expenses incurred in investigating the title, and loss of interest on the purchase-money while lying at a banker's. Held, that, upon this declaration, time was clearly of the essence of the contract; that the plaintiff was under no necessity of keeping his money at the banker's after the 25th of March; and that the plaintiff could not recover for any expenses or loss of interest subsequent to that time.¹

14. A suit in equity, between a vendee and an adverse claimant of the land sold, often gives rise to questions as to the form of pleading the vendor's title. Upon this subject it is held, that the plea of a purchase for valuable consideration must allege seizin and possession in the vendor.² So a plea of title derived from one having only a particular estate, and not in possession, must set out how the person became entitled.³

15. To a bill brought by an heir, the defendant pleaded, that he was a purchaser for valuable consideration. Held bad, because he did not plead a purchase from one of the plaintiff's ancestors; and a purchase from a stranger, who might have no title, was held no good plea, and the defendant was ordered to answer.⁴

16. A plea of a bare title only, without setting forth any consideration, will not protect a defendant from giving an answer to the title set up by the plaintiff.⁵

17. Where a defendant, by his answer, insists that he is a purchaser for valuable consideration, and without notice, proof of payment of the purchase-money is an essential part of the defence; and, if the defendant fails at the hearing to

¹ *Metcalf v. Fowler*, 6 Mees. & W. 830, 834.

² *Trevanian v. Mosse*, 1 Vern. 246.

³ *Hughes v. Garth*, Ambl. 421.

⁴ *Seymour v. Nosworth*, 2 Freem. 128; 5 Ch. R. 23; *Nelson*, Ch. R. 135.

⁵ *Brereton v. Gamul*, 2 Atk. 241.

prove this, the Court will not allow the cause to stand over, in order to supply such defect.¹

18. Plea to a bill for possession, a purchase for a valuable consideration, and that the money was *bonâ fide* secured to be paid. Held, that, being only secured, it might never be paid, and the plea was therefore overruled.²

19. A purchaser, if he denies notice, need only set forth the purchase deed, and plead his purchase in bar to the discovery of the title-deeds.³

20. On a plea of purchase for valuable consideration, without notice of the plaintiff's title, it is sufficient to aver, that the person who conveyed was seized or pretended to be seized, when he executed the purchase-deeds; but, where a purchaser sets up a fine and non-claim as a bar, he must aver that the seller was actually seized.⁴

21. A defendant cannot, by *answer*, protect himself from answering fully, on the ground of his being a purchaser for valuable consideration.⁵

¹ Molony v. Kernan, 2 Dru. & War. 31.

² Hardingham v. Nicholls, 3 Atk. 304.

³ Aston v. Aston, 3 Atk. 302.

⁴ Story v. Windsor, 2 Atk. 630 ;

Head v. Egerton, 3 P. Wms. 279 ; Jackson v. Roe, 4 Russ. 514.

⁵ Ovey v. Leighton, 2 Sim. & Stu. 234 ; Portarlington v. Soulby, 6 Sim. 356.

CHAPTER XL.

LIMITATION.—LAPSE OF TIME.

1. In connection with the general subject of *remedies*, we may properly give some farther consideration to the effect upon the respective rights of vendor and vendee of *the lapse of time* after those rights accrued, and previous to any process of law for the purpose of enforcing them. We have already (Chap. 11,) treated the subject at some length, under the head of *the time of performance*; but, as constituting a frequent and important point of inquiry, by way of *defence to suits* in law or equity, it properly demands some further notice.

2. The now prevailing doctrine upon this subject, (together with a concise view of the heretofore varying decisions) is found in an opinion of Chancellor Kent, in the case of *Benedict v. Lynch*.¹ The facts of that case were as follows:

3. In March, 1810, A. agreed to purchase a farm of B., and to pay \$250 in one year; one third of the residue in one year thereafter, and the other two thirds in two successive years. Upon these payments, B. was to give a deed; and, if A. failed in the payments, or either of them, the agreement was to be void. A. entered and made improvements, but no payments; and B., in October, 1813, above two years after the first default, supposing the agreement void or abandoned, sold the farm to a third person. A bill filed by A. in 1814, on a tender of the whole purchase-money, for a specific performance of the agreement, was dismissed with costs. Chancellor Kent remarks as follows:² “The first question

¹ 1 Johns. Ch. 375.

² Ibid.

that naturally presents itself is, whether the time was not made part of the essence of the contract, and whether the contract did not become void on the failure of the plaintiff to make the first payment, in 1811. Lord Thurlow is said to have intimated, in *Gregson v. Riddle*,¹ that time could not be made of the essence of the contract even by a positive stipulation of the parties, but there was no decision on that point; and in other and later cases,² it has been admitted, that the parties may make the time of the essence of the agreement, so that, if there be a default at the day without any just excuse, and without any waiver afterwards, the Court will not interfere to help the party in default. The case is not analogous to that of a mortgage, where the only object of the security is the payment of the money and not the transfer of the estate; and it seems to be conducive to the preservation of good faith, and the rights of the parties, that if a contract of sale is expressly declared to be vacated on non-performance by a given day, that the Courts should not interfere, as, of course, to annul such a provision. The opinion of Lord Loughborough, in *Lloyd v. Collett*, contains a strong and decisive argument upon this point. 'There is nothing,' he observes, 'of more importance than that ordinary contracts between man and man, which are so necessary in their intercourse with each other, should be certain and fixed, and that it should be certainly known when a man is bound, and when not. There is a difficulty to comprehend how the essentials of a contract should be different in equity and at law. It is one thing to say the time is so essential that, in no case in which the day has by any means been suffered to elapse, the Court would relieve against it, and decree performance. The conduct of the parties, inevitable accident, &c., might induce the Court to relieve. But it is a different thing to say the appointment of a day is to have no effect at all; and that it is not in the

¹ Cited in 7 Ves. 268.

² *Lloyd v. Collett*, 4 Bro. 469; 4 Ves. 689, n.; *Seton v. Slade*, 7 Ves. 265.

power of the parties to contract, that, if the agreement is not executed at a particular time, they shall be at liberty to rescind it. In most of the cases there have been steps taken.' 'I want a case,' he says, 'to prove that where nothing has been done by the parties this Court will hold, in a contract of buying and selling, a rule that the time is not an essential part of the contract. Here no step had been taken, from the day of the sale for six months after the expiration of the time at which the contract was to be completed. If a given default will not do, what length of time will do? An equity arising out of one's own neglect! It is a singular head of equity.' It would be impossible for me to add to the perspicuity and energy of this reasoning; and the Lord Chancellor, in that case, held, that as the vendor had omitted to complete a purchase for six months, being all that time in default, he was considered as having abandoned the contract; and he said there was no case where no step had been taken by the one party, and the other had immediately, when the time had elapsed, refused to perform the agreement, that a performance had been decreed." Chancellor Kent then proceeds to examine cases, which have been supposed to favor a contrary doctrine. "The case of *Vernon v. Stephens*,¹ was a bill brought by a vendee for a specific performance after repeated defaults; but in that case different payments had been made and accepted, and farther time had been given after each default, by agreement in writing; and the final default, after the last agreement, arose from the death of the original vendor, and a neglect for some time to take out letters of administration, so that the last default was reasonably accounted for; and the case, therefore, proves nothing in favor of a party in default, without excuse, and without a waiver from the opposite party. The case of *Gibson v. Patterson*,² in which Lord Hardwicke was supposed to have held, that non-performance at the time was very immaterial, is proved to be most inaccurately reported,

¹ 2 P. Wms. 66.

² 1 Atk. 12.

and that Lord Hardwicke made no such decision in that case, and the facts admitted of no such deduction.¹ And, indeed, in another case,² Lord Hardwicke lays down the true rule on this subject, when he says, that it is the business of this Court to relieve against lapse of time in the performance of an agreement, *and especially where the non-performance has not arisen by default of the party seeking to have a specific performance.* So it was also held, in the case of *Hayes v. Camyll*,³ as early as 1702, that where one person has trifled or shown a backwardness in performing his part of the agreement, equity will not decree a specific performance in his favor, especially if circumstances are altered." Chancellor Kent then proceeds to cite the modern English cases. "In *Pincke v. Curteis*,⁴ the suit was by the vendor for a specific performance, and the plaintiff had failed, for near a month after the specified day, to complete his title; but it appeared that the delay arose because the title depended upon the event of a chancery suit, and the vendee was apprized of this cause of the delay, and acquiesced in it, and was willing to go on with the purchase, and a performance was consequently decreed. The Chancellor said, that if the vendee had called for the deposit at the end of the time limited for completing the purchase, and had insisted not to go on with the purchase, the Court would not have compelled him. The case of *Fordyce v. Ford*⁵ is to the same effect." So "a purchaser, who neglects his part of the engagement, will be left to his remedy at law (if he has any) though he may have paid part of the purchase-money. He cannot be suffered to lie by and speculate on the rise of the estate." The Chancellor then proceeds to cite the cases of *Spurrier v. Hancock*, and *Harrington v. Wheeler*,⁶ *Milward v. Thanet*,⁷ *Guest v. Hornfray*,⁸ *Seton v. Slade*,⁹ *Smith v.*

¹ 4 Ves. 689, 690, n.; 4 Bro. 497;
13 Ves. 228, 229.

² 1 Ves. 450.

³ 5 Viner, 538, pl. 18.

⁴ 4 Bro. 329.

⁵ 4 Bro. 494.

⁶ 4 Ves. 667, 686.

⁷ 5 Ves. 720, n.

⁸ 5 Ves. 818.

⁹ 7 Ves. 265.

Burnam,¹ *Paine v. Meller*,² *Alley v. Deschamps*;³ and, upon a thorough examination and analysis of the authorities, arrives at the conclusion above stated.

4. The same doctrine has been held by the Supreme Court of the United States. In *Brashier v. Gratz*,⁴ Marshall, C. J., says: "The rule that time is not of the essence of a contract, has certainly been recognized in Courts of Equity; and there can be no doubt, that a failure on the part of a purchaser or vendor, to perform his contract on the stipulated day, does not, of itself, deprive him of his right to demand a specific performance at a subsequent day, when he shall be able to comply with his part of the engagement. It may be in the power of the Court to direct compensation for the breach of contract in point of time, and in such case, the object of the parties is effectuated by carrying it into execution. But the rule is not universal. Circumstances may be so changed, that the object of the party can be no longer accomplished, that he who is injured by the failure of the other contracting party, cannot be placed in the situation in which he would have stood, had the contract been performed. Under such circumstances, it would be iniquitous to decree a specific performance, and a Court of Equity will leave the parties to their remedy at law.

5. So in the case of *Garnett v. Macon*,⁵ Marshall, J., says: "It has been repeatedly declared, both in the Courts of England and of this country, that time is not of the essence of a contract; and that a specific performance ought to be decreed if a good title can be made at the time of the decree. This principle is sustained by many decisions, and by the practice of the Court of Chancery in England to refer it to a Master, to report whether the title be good at the time. But I do not think that the English Court of Chancery has ever laid down the broad principle, that time was never important, and that an ability to make a title at

¹ 2 Anst. 527.

² 6 Ves. 349.

³ 13 Vcs. 224.

⁴ 6 Wheat. 533.

⁵ 6 Call, 370.

the time of the decree, arrested all inquiry into the previous state of things. On the contrary, if a person sell an estate, to which he has no title, he cannot, though he should afterwards acquire it, enforce the contract. There is an implied averment in every sale made without explanation, that the vendor is able to do what he contracts to do. If he is not, and the vendee sustains an injury in consequence of this inability, it would seem unreasonable that the contract should be enforced; it would be the more unreasonable, if the amount of the injury should not be the subject of exact calculation. It is a general rule, that he who asks the aid of a Court of Equity, must take care that his own conduct has been exactly correct. It would be strange, if this general rule should be totally inapplicable to time, in the execution of a contract. If the day be carelessly or accidentally passed over without making a conveyance, and no serious inconvenience result from the omission, the objection would be captious, and would very properly be discountenanced; but if the vendor was unable to clear up the title, until such an alteration had taken place in the state of things, as materially to affect the parties, time, I think, cannot in reason, be deemed unimportant."

6. So it is held in Maine, that laches and negligence in the performance of contracts are not to be countenanced or encouraged; and the party seeking performance must show, that he has not been in fault, but has taken all proper steps towards performance on his own part, and has been ready, desirous, and prompt to perform. Shepley, J., says: "Time is of the essence, where the thing sold is of greater or less value according to the effluxion of time, and the sale of a reversion, and of stock, are put as examples of the rule. So when a house is known to have been purchased for a residence at a particular time, and when the parties have by their contract expressly so agreed, time is essential, and in these cases no relief is given against the lapse of time. It is not of the essence of the contract, where the object is

security for the payment of money; and in the ordinary case of the sale of an estate, the general object being the sale for an agreed sum, the time of payment is regarded as formal, and that stipulation as meaning, that the purchase shall be completed within a reasonable time, regard being had to all the circumstances. Time is not, however, in such cases to be altogether disregarded, but to entitle him to relief where time is not essential, the party asking it must show, that circumstances of a reasonable nature have prevented a strict compliance, or that it has been occasioned by the fault of the other party, or that a strict compliance has been waived.”¹

7. So, in the case of *Fordyce v. Ford*,² the Master of the Rolls said: “I hope it will not be supposed, that a man is to enter into a contract, and think that he is to have his own time to make out his title.” So, it is said, lapse of time, change of circumstances, and indifference on the part of the vendee of land, are circumstances to induce a Chancellor to refuse a decree of specific performance.³ So it was held, that reversionary leases at an under-value, obtained by an agent from his principal, the relation of creditor and debtor also subsisting, after an acquiescence of twenty-seven years, should not be set aside; the fiduciary character having during that period ceased to exist, and the transactions being recognized on oath by the principal, as fair. So a sale of the reversion, upon a calculation of the rents reserved on such leases, cannot therefore be impeached; being in other respects fair, and acquiesced in for almost twenty years.⁴ So specific performance was refused on the laches and trifling conduct of the plaintiff; the contract being for a sale to the plaintiff, under a bankruptcy, of a reversionary interest for life, which in the interval fell into possession. The defendants having also been in some degree remiss, the bill was dismissed without costs, upon delivering up the agreement.⁵

¹ *Rogers v. Saunders*, 16 Maine, 92, 98.

² 4 Bro. 498.

³ *Patterson v. Martz*, 8 Watts, 374.

⁴ *Medlicott v. O'Donnell*, 1 Ball & Bea. 156.

⁵ *Spurrier v. Hancock*, 4 Ves. 667.

So a bill to set aside a purchase by a trustee for himself and his children, after a lapse of eighteen years, was dismissed, upon the length of time only.¹ So it was held, that a decree, setting aside a sale, should not be carried into execution, on account of the length of time that had elapsed, and the change of circumstances by the rise in land, and proportionate depreciation of money. Upon these grounds, a bill in 1799, to have the benefit of a decree in 1740, setting aside a sale in 1721, and directing accounts, the suit having abated in 1771 by the death of the defendant, and in 1774 by the death of the plaintiff; was dismissed.²

8. But, as has been already seen, (Chap. 11,) time is not in all cases held an essential part of the contract, nor mere lapse of time, in all cases, an objection to specific performance. Thus, where an agreement for the sale of land was suffered to remain unexecuted for fourteen years, the vendee having continued in possession, the Court, under the circumstances of the case, decreed a specific performance of the contract. Spencer, J., says: "Generally speaking, the obligation of an agreement binds the parties from the moment it is entered into; and place and time are circumstances affecting only the performance of the engagement; and do not import, in a Court of Equity, conditions by which the parties are to be considered as contracting on the ground of a strict compliance, but are mere circumstances admitting of compensation. The appellant and Wisner bound themselves to give a conveyance on or before the 1st of December, at which time the respondent was to secure the purchase-money. These acts were to be concurrent. The conveyance must necessarily have preceded the security. The *laches* in not perfecting the contract is certainly as much, if not more, attributable to the appellant than to the respondent. The lapse of time, in a case like the present, where no material inconvenience has been suffered by the appellant, can be

¹ Gregory v. Gregory, Coop. 204.

² Egremont v. Hamilton, 1 Ball & Bea. 576.

urged only on the ground that the agreement has lain dormant, and that this is evidence of the abandonment of it by the parties. Had the respondent entered as a tenant originally, and then made the agreement, and continued to possess, the possession might have been viewed as a tenancy and it might have been insisted that the possession was not an affirmance of the agreement. But as the case is, the continuance of the possession, by the tacit consent of the appellant, until he instituted the ejectment suit, was a constant and continued affirmance on the part of the appellant that the holding was under the agreement. The counsel have insisted, as a notorious fact, that the lands have appreciated. On this point we have no evidence; but if it be admitted, are we to suppose that the appreciation of the land is greater than the interest of the money, in case no payment has been made? I cannot say so; and, therefore, in the absence of proof to the contrary, I recur to the observation, that the appellant will suffer no material inconvenience from the lapse of time.”¹

9. In 1796, in Connecticut, E. agreed to sell C. certain lots of land in New York, for which he duly executed and acknowledged a deed of conveyance. C. paid part of the consideration, and gave notes for the residue; but, not having security for them at hand, the deed was left in the hands of H. as an escrow, until security should be furnished. E. died in 1800, the notes not having been paid or secured. C., being indebted to the complainant, made to him a deed of these lots; informing him then or afterwards, that he had no title, and that the deed had been left with H. as security. After this information, the complainant made indirect overtures to get the deed from B., and finally succeeded. E. or his representatives caused the true state of the case to be made known to the complainant, and the amount justly due on the notes to be demanded of him, which he refused to pay, relying on his title. The complainant took possession,

¹ *Waters v. Travis*, 9 Johns. 450, 466.

and sold the lands with warranty. In 1820, the heirs of E. commenced ejectments for the lands, which the complainant defended. On trial, H. proved the delivery of the deed, as he had before explained the fact to the complainant; and, the Judge being of opinion that the deed was an escrow, verdicts were found for the lessors of the plaintiff, the defendants in this suit, upon which the complainant filed this bill. Held, this was in substance the ordinary contract for a sale of lands, when the title remains in the vendor as security, and really, though not in form, a *mortgage*; that time was not of the essence of the contract, but compensation might be made, being the amount of interest; that, though the conduct of the complainant was immoral and reprehensible, and though the delay of both parties had been great, yet those circumstances did not deprive the complainant of rights previously acquired; and that the complainant was entitled to relief, upon payment of the principal due on the notes, with interest, costs, and expenses both at law and in equity; including not only legal costs, but all reasonable expenses of every kind, which the litigation had imposed on the defendants.¹

10. In an action of ejectment, it appeared that one G., under whom the defendant claimed, was let into possession twenty-two years before action brought, by virtue of a contract with P., for the purchase of an allotment accruing to P., under an inclosure act, which provided that a purchaser let into possession of an allotment should have the same rights as the vendor. G. paid interest on a portion of the purchase-money for some years, but never completed the purchase. Held, that even after a lapse of twenty years his possession was not adverse to P.'s title; also, that it did not lie in the mouth of G., or any claiming under him, to raise an objection to P.'s title, that the Commissioners of Inclosure had made no formal award. Tindal, C. J., says: "It has not been contended that, under such circumstances, Payne him-

¹ Leggett v. Edwards, Hopk. 530.

self might not have ejected Gegg within twenty years; and I want to see how his possession could be deemed adverse, unless it could be shown he refused to quit after notice, or refused to pay interest." With respect to the allotment, he proceeds to remark: "The authority given to the commissioner was to put Gegg in possession; according to the language of that authority, the allotment must have been made before. Now, under the twenty-third section of the act, a party who has agreed to purchase shall, if let into possession, have the same rights as the vendor; and it is said that, as no award has been made by which the property was given to Payne, he can now have no title to recover in ejectment. To which the first answer is this, that, if this argument be well founded, it was as strong at the end of a fortnight as at the end of twenty years; and yet no one could contend that the vendor might not, at the time, have turned Gegg out of possession. Again, if it be established that Gegg was let in under the authority of Payne, it does not lie in Gegg's mouth to say that Payne had no title. He must stand or fall by the title of the party under whom he obtained possession; and the twenty-third section of the act was inserted with a different view; not to raise questions between the vendor and vendee, but that the vendee, as against others, might stand clothed with the same right as upon an allotment made to himself." Bosanquet, J., says: "An agreement was made for the purchase of the property, and the vendee continued to pay interest for several years after having been let into possession by the vendor. Being so let into possession, he is not a trespasser till he has refused to quit after demand made upon him." "Suppose, that instead of a sale in fee,—and we have no evidence what interest was sold here,—the agreement was for a short demise, the party claiming under such an agreement would be a person interested under the act, and entitled to be let into possession; and yet is it to be contended that he has all the rights of an owner in fee, when he is let in only for a term? Here the

interest of the party occupying was only a permissive interest, inferior to that of a lessee.”¹

11. So, where a contract for the sale of land is proved, and an uniform possession of part under it, length of time is no bar to a specific performance.² So, where the assignee of a lease for ten years, with the privilege of then taking the property at a stipulated price, makes considerable improvements thereon, indicating an intention to purchase; the lessor dies, and the heirs are, some, infants, others non-residents, and the administrator refuses to receive the purchase-money; and no suit is brought for twenty-one days after the expiration of the lease; it violates no principle of equity or justice, to say there is no forfeiture of the right to purchase and hold the premises.³ So, after bill, answer, and replication, no farther steps were taken in the cause for upwards of twenty years. Held, not of itself a reason for refusing specific performance, there being acquiescence on both sides. But held to be a good reason for not giving costs.⁴

12. What length of time in neglecting to perform a contract is unreasonable, and would authorize its rescission at the will of the party complaining of such neglect, is a matter of law to be determined by the Court.⁵

¹ *Doe v. Edgar*, 2 Bing. N. C. 498, 502, 503, 504.

² *Somerville v. Trueman*, 4 Harr. & McHen. 43.

³ *Page v. Hughes*, 2 B. Mon. 441.

⁴ *Cane v. Allen*, 2 Dow, 289.

⁵ *Ragan v. Gaither*, 11 Gill & Johns. 472.

CHAPTER XLI.

SALES BY ORDER OF COURT.

1. HAVING now completed, in regular order of subjects, a view of the rights and remedies growing out of the contract of sale and purchase of real property, a few remaining and somewhat miscellaneous topics, connected with the same general subject, will complete the plan of the present work. Among the most important of these, is the subject of *sales by order of Court*.

2. Sales of real estate may be made by order of a Court of Chancery, as well as by voluntary contract between the vendor and vendee. In many respects, of course, different considerations are applicable, and different rules established, as bearing upon the validity and effect of these two kinds of sales; making it necessary that the subject of *judicial sales* should be distinctly presented. In this country, however, the transaction in question is of much less frequent occurrence than in England, and therefore demands a proportionally brief notice in the present work.

3. It has been sometimes held, that to all sales under the orders and decrees of the Court of Chancery, the rule *caveat emptor* is to be applied.¹ But, on the other hand, this rule has been held not to apply to sales by the Master in Chancery; for, he being the agent of the parties, for whose benefit the sale was made, they are as much bound by his representations as they would have been by their own. Thus, where a tract of land has been sold by the Master in Equity, and represented upon a map as containing more acres than

¹ *Anderson v. Foulke*, 2 Harr. & Gill, 346.

it was discovered upon a resurvey to have, an abatement will be allowed for the deficiency in the quantity, according to the nature and extent of the defect.¹

4. A contract of sale, made between the Court as the vendor, through the agency of a trustee, and the purchaser, is never regarded as consummated, until it has received the sanction and ratification of the Court.² So the purchaser under a decree is considered as owner, only from the time he pays in his purchase-money, not from the confirmation of the report, by which he is declared the best purchaser, he having taken objections to the title.³

5. A party interested in the proceeds of property decreed to be sold, although his right in the property is merged in the decree, retains such an interest as will enable him to apply to the Court, to preserve the estate from injury and waste.⁴

6. Where a vendee had purchased land of a person, who held title under a void decree in equity, no decretal sale having been made; it was held, that the vendee was presumed to have known his title, and that his title failed by a reversal of the decree.⁵

7. We have already (Chap. 6,) considered the subject of sales at *auction*, and the circumstances which avoid such sales; (a) more especially the act of *puffing* or *by-bidding*, by

¹ *Tunno v. Flood*, 1 M'Cord, 121.

⁴ *Wagner v. Cohen*, 6 Gill, 97.

² *Wagner v. Cohen*, 6 Gill, 97.

⁵ *Madeira v. Hopkins*, 12 B. Mon.

³ *Mackrell v. Hunt*, 2 Madd. 34, n.

595.

(a) With regard to the proceedings *prior* to the sale, which may affect its validity, it is held that an advertisement of sale by the Master need not be signed with his own proper signature, but may be printed or signed by another. *Coxe v. Halsted*, 1 Green, Ch. 301.

A reasonable notice of the sale is sufficient; and it may be ordered, in the discretion of the Court, for cash or credit. *Darrington v. Borland*, 3 Port. 12.

A sale was advertised, to take place *between the hours of 12 and 5 o'clock in the afternoon*. Held, although not so precise as convenience required, the

which the price is unduly enhanced, and which the law treats as a fraud upon the fair purchaser. Sales at auction by order of Court have been subjected to similar restriction. Thus it is held to be the policy of the Court of Chancery to encourage a fair competition at a Master's sale; and to effect this object, it will not allow any deception whatever to be practised upon bidders.¹ But, at a sale by order of Court, a reserved bidding was allowed, to be made one of the conditions, the Master to fix the amount, and to use his discretion in communicating it to the parties or their solicitors.²

8. One of several defendants having purchased an estate sold under the decree, without having obtained leave to bid; another defendant moved, that the estate might be again put up at the price bid, and, if it should bring more, that the sale might be set aside, and the purchaser pay the expenses of the resale, and the costs of the motion. The Court refused the application, but without costs.³

9. The parties interested in the property have a right to expect, that it will be put up and sold in the usual manner, and in a way to produce a fair competition among the persons attending to bid. And, where the property has been sacrificed, by the neglect or mistake of the Master in this behalf, or by his having improperly put up for sale several lots together, which should have been sold separately; the parties injured are entitled to a resale, or to such other relief as can be given, without doing injustice to a *bonâ fide* purchaser.⁴ Where the property consists of separate and dis-

¹ Veeder v. Fonda, 3 Paige, 94.

⁴ American, &c. v. Oakly, 9 Paige,

² Jervoise v. Clarke, 1 Jac. & W. 389. 259.

³ Elworthy v. Billing, 10 Sim. 98.

sale should not be set aside on this ground. *Coxe v. Halsted*, 1 Green, Ch. 311.

A sale was advertised to be made *on the premises*, and actually took place within eighty yards, and in view, of the dwelling-house, but fifteen or twenty yards from the boundary line. Held, the sale should not be set aside for this cause. *Ferguson v. Franklin*, 6 Munf. 305.

tinct parcels, which can be enjoyed separately without diminishing their value, it is the duty of the officer to sell in parcels, except in very special cases.¹ (a)

10. In New York, all sales of mortgaged premises, under a decree of the Court, must be made by a Master, or under his immediate direction. A sale by a person deputed for the purpose by a Master, in his absence, is irregular, and will be set aside.²

11. Sale by assignees under a bankruptcy, by auction, to one of the creditors, previously consulted as to the mode of the sale, and contrary to an order that a receiver should be appointed to sell. Another sale was directed, the estate to be put up at the aggregate amount of the purchase-money and the sum laid out in substantial improvements and repairs; which were to be allowed in case of a sale at an advance; but, if no further bidding, the purchaser to be held to his purchase.³

12. By an order for the resale of mortgaged premises, the Master was directed to put them up at a particular sum, and resell, if that amount or more was bid. The premises were struck off for the sum specified, and thereupon the Master, acting under direction of the complainant's solicitor, and without any previous intimation to that effect, insisted upon the immediate payment of the bid in specie, although the purchaser offered to pay in good current bank bills, or drafts on specie-paying banks, or to pay specie as soon as it could be obtained from the banks. The Master immediately put up the property again, upon the terms that specie should be

¹ *American, &c. v. Oakly*, 9 Paige, 259.

³ *Hughes ex parte, Lyon ex parte*, 6 Ves. 622.

² *Heyer v. Deaves*, 2 Johns. Ch. 154.

(a) The last clause of the 138th rule was only intended to provide for special cases; where it is evident that several parcels, from their peculiar location in reference to each other, will be more valuable if owned by one person, or where, in consequence of some prior incumbrance upon all the parcels, purchasers will not be likely to bid upon a portion only. *American, &c. v. Oakly*, 9 Paige, 259.

paid down, and, no person purchasing on these terms, he reported that the terms upon which the resale was directed had not been complied with. Held, the conduct of the Master was improper and unjustifiable, and the purchaser entitled to a deed upon payment of the amount of his bid; and the report of the Master was set aside, and he was directed to execute to the purchaser a deed upon such resale.¹

13. A motion to open biddings for several lots, purchased by different purchasers, on an advance of a certain sum for each lot, is irregular.²

14. An announcement by the Master, after the property has been struck off, at a sale made by him, that if the purchaser does not comply with the terms of the sale, the property will be resold at his expense, does not discharge the purchaser from his bid.³

15. Biddings will not be opened because the price is too high or too low, if the sale has been regularly conducted and fairly made.⁴ But, where several lots have been purchased by the same person, and the biddings are ordered to be opened as to those first purchased, the purchaser will be allowed to open them as to the remainder.⁵ And, if there should be made to appear, either before or after a sale has been ratified, any injurious mistake, misrepresentation or fraud, the biddings will be opened, the sale rejected, or ratification rescinded, and the property resold.⁶ It is held that, the Master who sells property should insert nothing in his description in the notice of sale, which may unduly enhance the value of the property or mislead the purchaser. Thus, where land sold under a decree was described in the Master's notice as containing about twenty acres, when in fact it contained but thirteen, and one of the complainants, who was present at the sale, knew of the deficiency, but concealed it from the Master and the bidders, and encouraged

¹ *Baring v. Moore*, 5 Paige, 48.

² *Goodall v. Pickford*, 6 Sim. 379.

³ *National, &c. v. Loomis*, 11 Paige, 431.

⁴ *Gordon v. Sims*, 2 M'C. Ch. 159.

⁵ *Price v. Price*, 1 Sim. & Stu. 386.

⁶ *Anderson v. Foulke*, 2 Harr. & G. 346.

them to bid; the sale was set aside on application of the purchaser.¹ So where a memorandum, not authorized by the Master, was read at a Master's sale, describing the dimensions of the dwelling-houses sold, and which turned out to be incorrect by several feet, the sale was vacated.² So, it is said, in Lowndes's case, the sale was set aside at the instance of the purchaser on account of a serious mistake in the representation of the lands. In Roper's case because the land was knocked off to the purchaser prematurely by mistake of the auctioneer, who did not hear a higher bid.³

16. A purchaser, defendant in a suit for specific performance, did not in his answer mention any warranty or representation made by the vendor, and insisted merely that a good title was not shown. A reference of title was ordered; the Master reported in favor of the title, and a decree for specific performance was pronounced. After the order of reference, the defendant discovered that the timber on the estate, which constituted its principal value, was much less in quantity than it had been represented to be in a statement, the accuracy of which was alleged to have been warranted at the sale; but the fact of such warranty was strongly controverted. Under these circumstances, leave was given to file a supplemental bill, in the nature of a bill of review, in order that the defendant might have the same benefit of the alleged warranty, as if he had originally insisted on it in his answer. And, after such leave, he has a right to file the bill, without having previously paid the purchase money which the decree commands him to pay, if the time at which the adverse party, in the due execution of the decree, can compel payment, has not yet arrived.⁴

17. A purchaser under a decree agreed to sell to A., and died, his heir being abroad. Ordered, that A. should be substituted for him as purchaser, be at liberty to pay the purchase money into Court, and be let into possession.⁵

¹ *Veeder v. Fonda*, 3 Paige, 94.

² *Laight v. Pell*, 1 Edw. 577.

³ *Gordon v. Sims*, 2 M'Cord, Ch. 159.

⁴ *Partridge v. Usborne*, 5 Russ. 195.

⁵ *Pearce v. Pearce*, 7 Sim. 138.

18. Under a decretal order of the Court, certain lands were sold by the Master, and the purchaser, in conformity with a further decretal order, gave security to the Master, by a covenant with a surety to pay the purchase-money within fifteen days; but the money was not thus paid. Held, that a remedy at common law would be impracticable and inadequate; that no proper damages could be given upon such covenant; that whoever makes himself party to the proceedings of a Court of Equity, and undertakes to do a particular act under its decretal orders, may be compelled to perform what he has undertaken; and that equity may by attachment compel a purchaser at a sale by the Master or his surety to pay the purchase-money. So, although the surety was not aware that he subjected himself to the summary process of the Court; nor that the plaintiff had a right, on the default, to resell the lands. Nor can the surety take any exception to the title, if the purchaser, his principal, has failed to do so.¹

19. A purchaser of estates sold under a decree was discharged on motion from his purchase, upon proof of error in the decree, though the parties were proceeding to rectify it. In this case, Lord Eldon remarked, that he would not extend the rule which the Court had adopted, of compelling the purchaser to take the estate where a title is not made till after the contract, to any case to which it had not already been applied.²

20. The Court of Chancery has power, even after enrolment, to open a regular decree obtained by default, and to discharge the enrolment, for the purpose of a defence upon the merits, where the party has been deprived of such defence either by mistake or accident, or by the negligence of his solicitor. So, after a sale by a Master under the decree, where the complainant himself became the purchaser, and has not reconveyed to a *bonâ fide* purchaser or mortgagee.³

21. An appeal lies from the decretal order of the Chan-

¹ Wood v. Mann, 3 Sumn. 318.

³ Millspaugh v. McBride, 7 Paige,

² Lechmere v. Brasier, 2 Jac. & W. 509.
287.

cellor, refusing to open the sale of mortgaged premises and grant a resale, on application of a defendant, although he has permitted the bill to be taken against him *pro confesso*.

22. A resale will be ordered, where mortgaged premises have been sold greatly below their value, and bought in by the mortgagee, if the mortgagor, or those standing in his place, have been misled by the mortgagee, or even by a third person, in reference to the foreclosure, and in consequence thereof do not attend the sale.¹

23. Land was sold under a decree, and the sale, after opposition by the purchaser, was ratified; but the trustee received neither notes nor bonds for the purchase-money. The period for payment having expired, the Chancellor ordered the purchaser to pay to the trustee, or bring into Court, the amount of the purchase-money and interest before a given day, or show good cause to the contrary. The purchaser having failed to comply, the Chancellor then ordered an attachment against him, to enforce obedience to his first order. On appeal, held, that the proceeding was valid.²

24. Where sales of estates had fraudulently taken place, under decrees of the Court of Exchequer in Ireland, obtained by collusion between the tenant for life, the mortgagee, the person in whose favor a charge had been created, and the purchaser; and where the interests of the tenant in remainder had not been protected in such suits; the Court of Chancery in Ireland, on his coming into possession, granted him relief on a bill filed to redeem; and that decree was affirmed by the Lords.³

25. A purchase under a decree, though affected by irregularity and notice, will not be set aside in favor of a subsequent remainder-man; a prior tenant in tail having been a party.⁴

26. The Court will not discharge a purchaser and substi-

¹ Tripp v. Cook, 26 Wend. 143.

³ Bandon v. Becher, 3 Clark & Fin.

² Anderson v. Foulke, 2 Harr. & G. 479.

⁴ Lloyd v. Johnes, 9 Ves. 37.

tute another, even upon paying in the money, without an affidavit that there is no under-bargain; for the new purchaser may give the other a sum of money to stand in his place and so deceive the Court.¹

27. A trustee having sold lands by order of the Court of Chancery, and reported his proceedings to that tribunal, where, after objections by the purchaser, they were ratified, and the ratification sanctioned by the Appellate Court; it is no longer competent for such purchaser to contest that sale, nor to object that he was not reported in the usual way, as the purchaser.²

28. An original bill in chancery cannot be filed by a party to a foreclosure suit, to set aside a Master's sale under a decree, where relief could have been obtained by a summary application to the Court, in the foreclosure suit.³

29. A vendor obtained a decree for specific performance, with a declaration that, if the purchase-money was not paid by a given day, the estate should be sold, the proceeds paid to the vendor, and the purchaser be made personally liable for any deficiency. The Master fixed the day of payment, but the purchaser died before that day, insolvent; and a creditor's suit was instituted for the administration of his assets. Upon a bill of revivor and supplement, filed by the vendor, praying to have the benefit of the creditor's suit, as well as his own; held, he was not entitled to prove against the general assets of the testator, and at the same time to reserve his lien on the estate contracted to be sold, in case of a deficiency in the general assets.⁴

30. A purchaser under a decree is not affected by irregularities and defects in the decree, by which the application of the money may not have been properly secured.⁵

¹ *Rigby v. Macnamara*, 6 Ves. 515.

² *Anderson v. Foulke*, 2 Harr. & G. 346.

³ *Brown v. Frost*, 10 Paige, 243.

⁴ *Rome v. Young*, 3 Y. & Coll. 199.

⁵ *Curtis v. Price*, 12 Ves. 89.

CHAPTER XLII.

REMEDIES IN CASE OF FRAUD, ETC.

1. WE have already, in various connections, (see Chaps. 13, 17, 19,) referred to the respective claims of vendor and vendee, growing out of some *wrongful* act or omission of one party in reference to the other; more especially *fraud* or *concealment*, whereby the price of the property sold is affected, to the injury of the party upon whom such fraud or concealment is practised. As constituting the foundation of *actions* in law or equity, the same subject may be further briefly considered in the present connection.

2. It has been held that, where a purchaser takes advantage of the distress or ignorance of the vendor, or of any particular authority over him, a Court of Equity may set aside the purchase as fraudulent, even after the purchaser's death.¹ So, that an action will lie against the *seller* of any interest in an estate, for affirming the *rents* to be more than they are, while he is in treaty about the sale, if the purchaser relies and acts upon the affirmation. So, though the seller was not then in possession; and though the affirmation preceded the sale.² (a)

¹ Gould v. Okeden, 4 Bro. P. C. 198.

² Lysney v. Selby, 2 Ld. Raym. 1118.

(a) The following statement of the general rules of law upon this subject, not perhaps exclusively applicable to real property, is found in a late English case in equity:—

Cases have frequently occurred, in which, upon entering into contracts, misrepresentations made by one party, have not been in any degree relied on by the other party. If the party to whom the representations were made, himself resorted to the proper means of verification before he entered

3. A contract was made, under the persuasion that the Legislature of Pennsylvania and the Congress of the United States would pass laws, the one for the termination of the Erie Extension of the Pennsylvania Canal at the mouth of Elk Creek, and the other making appropriations for a harbor at the same point; and the main and only inducement to this contract was, the mutual expectation of the parties, that

into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such, as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded. Again, when the Court is endeavoring to ascertain what reliance was placed on representations, it must consider them with reference to the subject-matter, and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into, after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed, that the ignorant man relied on the statements made by him who was supposed to be better informed; but if the subject is in its nature uncertain, if all that is known about it is matter of inference from something else, and if the parties making it, and receiving representations on the subject, have equal knowledge and equal skill, it is not easy to presume, that representations made by one would have much or any influence upon the other. *Clapham v. Shillito*, 7 Beav. 146.

So in a late American case it is held that, where parties to a contract have presupposed some facts or rights to exist, or that will thereafter exist, as the basis of their proceedings, which in truth do not exist, or are prevented from happening by unforeseen causes ending in mutual error, under circumstances material to their character and consequences; such contract, on general principles, is inoperative and invalid. So, that, where a contract is made under a mistake, or in ignorance of a material fact which is of the very essence of the contract, it is voidable and relievable in equity. So, it seems, not only where there has been studied suppression or concealment, but in many cases of innocent ignorance and mistake on both sides. *Miles v. Stevens*, 3 Barr, 21.

the land immediately adjacent to the mouth of the creek would become the site of a great city, as the direct consequences of the public improvements there to be made. Held, that where such inducements utterly failed, without fault imputable to any person, it would be contrary to equity to compel payment of the purchase-money.¹

4. Articles of agreement for the sale of lands contained the following stipulation: "The said A. hereby agrees to sell unto the said B. and C., &c., one undivided half part of two hundred acres of land, situate on Elk Creek, in the county of Erie, and including the mouths of said creek; said two hundred acres to be cut off the lands of the said A. by lines hereafter to be designated by the said A., B., and C., or a majority of them, so as to embrace within said two hundred acres the lands at the harbor of said Elk Creek best suited for the site of a city intended to be located on the same." Held, these words were not only a description of the premises sold, but also a representation that there was a harbor there, which, being the assertion of a material fact, would affect the contract, and attain it with fraud, if it were proved to be untrue. That it would be error for the Court to submit the construction of the agreement to the jury, and instruct them that they might infer from it alone misrepresentations by the vendor; but it would not be error, where other evidence had been given, to submit the agreement, with such evidence, to the jury, and to instruct them "to weigh all the facts in the case, and to say whether they tend to prove that the vendor misrepresented the condition of the mouth of Elk Creek, relative to a harbor, and, if they believed the vendor had practised a fraud upon the vendees, in relation to the existence of a harbor at that place, such fraud would entirely vitiate the contract."² (a)

¹ Miles v. Stevens, 3 Barr, 21.

² Ibid.

(a) Evidence, that there was no harbor at the mouth of Elk Creek, and not the slightest probability that one would be constructed, was held to be relevant and admissible; as it went to contradict the representation of the vendor, that there was a harbor there. Miles v. Stevens, 3 Barr, 21.

5. The vendor of a public house, pending the treaty, made certain deceitful representations respecting the amount of the business done in the house, and the rent received for a part of the premises, whereby the plaintiff was induced to give a large sum for them. Held, the latter might maintain an action on the case for the deceitful representations, although they were not noticed in the conveyance, or in a written memorandum of the bargain, drawn up after they were made.¹

6. Defendant, being owner of a house, employed an agent to sell it. The agent described it as free from rates and taxes, and did not know it to be otherwise; but it was in fact liable to certain rates and taxes, as the defendant knew. On the faith of the agent's description the plaintiff bought the house. Held, that the plaintiff might maintain case for deceit against the defendant, though it did not assert that the defendant had instructed the agent to make any representation, as to rates or taxes.²

7. The declaration stated, that one B. had agreed with the plaintiff for the purchase of the lease and good-will of a public house; that, before and at the time of making the agreement, the defendant falsely, fraudulently, and deceitfully represented to B., that the trade of the house was of a certain extent; that B. had not been able to complete the purchase, and it was afterwards agreed between the plaintiff, B., and the defendant, that the plaintiff should become the purchaser in the room of B., and at and before the making of the last-mentioned agreement, B. communicated to the plaintiff the representation the defendant had made to him; *of all which the defendant then had notice*; that the plaintiff, confiding in the representation so made by the defendant, agreed to become the purchaser, and paid the purchase-money; that the representation was false, as the defendant well knew; and that the plaintiff sustained damage. The defendant pleaded, that he did not authorize B. to communicate to the plaintiff the representation he, the defendant,

¹ Dobell v. Stevens, 3 Barn. & Cress. 323.

² Fuller v. Wilson, 3 Ad. & El. 58.

had made to B. Held that the declaration disclosed a good cause of action, and that the plea was no answer to it. Tindal, C. J., says, in substance, as to the declaration: "The plaintiff took upon himself the fulfilment of Bowmer's contract in all its parts. Bowmer had contracted and agreed with the defendant for the purchase of the lease and goodwill of the premises for the sum of £1,175, and, being unable to complete the purchase, it was agreed that the plaintiff should become the purchaser in *the room and stead of Bowmer*. I can only understand this as a transferring to the plaintiff of the contract of Bowmer, with its price and all other incidents. The defendant, after he has had notice that the misrepresentation he made to Bowmer has been communicated by him to the plaintiff, permits the latter to go on with the contract, takes his money, and executes a conveyance of the premises to him. The defendant's motive would be the same whether one party or the other became eventually the purchaser; the means employed would be the same, the end the same—the obtaining for the house a larger sum of money than he was conscious it was worth."¹ Vaughan, J., says: "The defendant has been guilty of a fraud, from which has resulted a damage to the plaintiff, and these are sufficiently averred, and I can hardly conceive a grosser fraud than that disclosed upon this declaration." Coltman, J., says: "The only doubt that has suggested itself to me has been whether the mere general averment of notice, without a specific averment that the defendant knew or supposed the plaintiff to have been acting upon the faith of the representation made by him, would suffice. But, upon consideration, I think it must be assumed that he had such knowledge."²

8. A bill charging falsehood and fraud in a sale, as to the exaggerated quantity of timber on land, may contain enough to justify setting the sale aside for a gross mistake in the quantity, without setting up the latter as a specific and sep-

¹ Acc. *Langridge v. Leroy*, 2 Mees. ² *Pilmore v. Hood*, 6 Scott, 827, 838, & W. 532; *Hill v. Gray*, 1 Stark. 434. 839, 840, 841.

arate cause; but it is better to have such cause stated independently, in order to give clearer notice to the respondents of what is to be contested.¹

9. One person owned an undivided share of land, the whole title of which had been vested in two of the others in trust for the rest, and these two had agreed to sell to him the whole at a given price, but he had failed to make or tender payment at the time agreed. The others having agreed to allow him further time, he sells at an advance, receiving the excess for himself, and the two then convey to him, he having conveyed to the purchasers, and receive the consideration agreed from the purchasers, through him. Upon a bill to set aside the sale, held, under these circumstances, the whole title was not in him, but before delivering the deeds he was their agent; and, if they took the proceeds and benefits of the sale, they must aid him to refund the consideration which they received. More especially where some of the owners in common, beside the persons negotiating the sale, united in the false representations and attempts to mislead, by making similar exaggerated statements as to the timber, and in forming another company in which they were part proprietors, to purchase of themselves at a still higher rate per acre than he was to give. This person was to be the agent to sell for that company, and at the same time was represented as the vendor to them after buying of the trustees, though in fact he never had a conveyance from the trustees nor made one to the other company. It was farther held, that, where such vendor keeps a part of the notes given for the consideration, and assigns them to a creditor as collateral security for a previous debt, or for a debt partly new, but not in payment or satisfaction of it; the note is open to any defence, which was good against it in his hands; more especially, where the creditor had notice of the consideration of the note, and probably had information of the exaggerations and misrepresentations practised.²

¹ *Smith v. Babcock*, 2 Woodb. & M. 216.

² *Ibid.*

10. As has been already stated, (Vol. 1, pp. 433, 436,) there may be a degree of unfairness in obtaining articles for the purchase of an estate, for which equity will not set them aside, but will refuse its aid to carry them into execution; and, if the party who obtained such articles has been in possession and made lasting improvements, he shall be allowed for them on consenting to deliver up the articles and account for the profits; otherwise, if he goes to law and fails there.¹ But a contract for the sale of iron mines was rescinded, on the ground of fraudulent misrepresentations of the value of the estate, and of the prices of ironstone and other materials, and of the quantities of materials required for the manufacture of iron, notwithstanding possession had been taken, the mines worked, and other acts of ownership had been exercised, and notwithstanding some acts in confirmation of the contract.²

11. It has been held,³ that an action on the case does not lie against a vendor for selling the lands of another man as his own. But, in connection with the decision of this point, Holt, C. J., says: "Suppose a man has houses in lease in the possession of his tenants, which is this case, and upon sale of them affirm that they are let at so much per annum rent. The case of *Eakins v. Tresham*,⁴ is, that an action will lie for such a false affirmation. If it were not for that resolution, I should think it a hard action to maintain. The difference is there taken between the annual value and the value in gross; if the vendee does not depend upon the affirmation of the vendor, but sends to inquire into the value of the houses, &c., what they let for, as it appeared the plaintiff did in this case, there it is not reasonable he should recover." Gould, J., said: "The value of the rents was a thing hard to be known, and secret, and known to none but the landlord and the tenants, and they might be in

¹ *Savage v. Taylor*, Cas. T. Talb. 234.

² *Small v. Attwood*, You. 407; 6 Cl. & Fin. 232.

³ *Lysney v. Selby*, 2 Ld. Raym. 1119, 1120, 1121.

⁴ 1 Keb. 510, 518, 522; 1 Lev. 102; 1 Sid. 146.

confederacy together." So an action of deceit will not lie against a person, for falsely affirming that he was incumbent of such a vicarage, and had a right to the tithes, and afterwards selling them, although the vendee lost the tithes thus purchased by their being taken by the lawful incumbent; for the seller could not have them without title, and the buyer is, at his peril to see it.¹

12. The proposition is sometimes found stated in the books, that *slander of title* to real property is a good ground of action. (a) The principle, however, is subjected to strict limitations. Thus an action does not lie against a person, for giving notice of his claim upon an estate, either by himself or his attorney, at a public auction, or to any person about to purchase, although the sale be thereby prevented, nor without proof of malice and damage to the plaintiff. Lord Mansfield, commenting upon the facts of the case, says: "The words of the message sent by Lee are true; and they proceed from a person called upon to give notice; either to protect his own property, or (what is his duty as a moral act,) to save another from being cheated. Lee had notice of Loveday's bankruptcy, from Bolland. Lee had an interest in the fund; and he was entitled to take out a commission against Loveday. He reads an advertisement 'for the sale of Loveday's estate.' He was thereby *called*

¹ Roswell v. Vaughan, 3 Cro. 196.

(a) The plaintiff having advertised for sale a bond executed to him by the defendant as a surety, the payment of which had been resisted in a long course of litigation, in which the validity of the bond was disputed; the defendant, pending a suit in error, published among the persons assembled at an auction sale of the bond a statement of all the circumstances under which it was made, and, referring to the plaintiff, concluded thus: "His object is, either to extract money from the pocket of an unwary purchaser, or what is more likely, by this threat of publication, to extort money from me." Held, this declaration was not protected as a privileged communication, or as a comment upon titles by a party interested, but was actionable without proof of express malice. Robertson v. McDougall, 4 Bing. 670.

upon, in order to preserve his own interest and that of the rest of the creditors, as an honest and a prudent man, to *give this notice*. For, if the estate had been purchased without notice of the bankruptcy, such purchaser would have been protected by a satisfied term prior to the act of bankruptcy still standing out. When an auction was advertised and was proceeding for the sale of this estate, with intent to cheat purchasers by a false title, shall not he, as an honest man, give this notice, and prevent iniquity? But here, this man (Lee) had a property of his own to secure; he was a creditor of Loveday, and intended to sue out a commission. Another ground to maintain such an action as this is, 'that it must be *such* a slander as goes directly to defeat the plaintiff's title.' But in this case, the assertion does not go to defeat the plaintiff's title."¹

13. So the attorney of a party, claiming title to premises put up for sale, is not liable in an action for slander of title, if he *bonâ fide*, though without authority, make such objections to the seller's title, as his principal would have been authorized to make.²

14. A lease, containing a proviso for reëntry, if the rent were in arrear twenty-eight days, was exposed to sale by the assignee, the rent being then in arrear for that period. At the sale, the lessor announced that the vendors could not make a title, in consequence of which bidders, who came to buy, went away; and he afterwards offered £100 for the lease, but subsequently recovered the premises in ejectment. Held, he was not liable to an action for slander of title.³

15. Action for slander of title, conveyed in a letter to a person about to purchase an estate from the plaintiff, imputing insanity to one A., from whom the plaintiff purchased, and stating that the title would therefore be disputed; *per quod* the proposed purchaser refused to complete the purchase. It appeared, that the defendant had married the

¹ Hargrave v. LeBreton, 4 Burr. 2422.

² Watson v. Reynolds, Moo. & M. 1.

³ Smith v. Spooner, 3 Taunt. 246.

sister of A., who was heir to her brother in the event of his dying without issue. Held, the defendant was not to be considered as a mere stranger; and the question for the jury was, not whether they were satisfied, as men of good sense and good understanding, that A. was insane, or that the defendant believed him so, upon such grounds as would have persuaded a man of sound sense and knowledge of business; but whether he made the communication *bonâ fide* believing it to be true, as he judged according to his own understanding, and under such impressions as his situation and character were likely to beget.¹

16. The *illegality* of a contract relating to the sale or purchase of lands is undoubtedly a good defence against an action to enforce it. But, in the following recent English case, the principle was held inapplicable to the facts of the case.

17. To a declaration in covenant the defendant pleaded, that, before making the covenant, it was unlawfully agreed between the plaintiff and defendant, that the plaintiff should sell and convey to the defendant land, at a certain price, for the purpose (as the plaintiff then well knew) that the said land should be exposed to sale by lottery, contrary to the 12 Geo. II., c. 28; that afterwards, in pursuance of the said illegal agreement, the said land was sold and transferred to the defendant, and, a part of the purchase-money being unpaid, the defendant, to secure the payment thereof to the plaintiff, entered into the covenant declared upon. Issue having been taken on this plea and found for the defendant, it was held, after verdict, that the plea disclosed no answer to the action, as it did not show that the covenant was entered into for the purpose of carrying out the prior illegal object, or in pursuance of the illegal contract. Lord Campbell, C. J., says: "The plea discloses nothing which shows that the deed or covenant is illegal. We must take it that after the transfer of the premises had been completed, there was a new agreement come to between the parties, under which

¹ Pitt v. Donovan, 1 M. & S. 639.

the defendant gave this security for part of the purchase-money. In that I see no illegality; it is not against either of the statutes, nor is it for the purpose of carrying on a lottery. For aught that appears, the illegal purpose may have been abandoned, and the defendant being in possession of the premises and using them for a perfectly lawful purpose, may have thought himself bound to pay the price, and therefore entered into this covenant. There is no infraction of the statutes or of the rules of morality in this. Where a security is given for the price of that which is absolutely illegal, as for a murder, although given after the crime has been committed, it would no doubt be bad, because there would be no consideration of any kind to support it. But here there is a good moral consideration that the vendor should receive the recompense stipulated for.”¹

18. We have already considered the restrictions and disabilities which the law imposes upon *attorneys*, in reference to the purchase of lands from or for the benefit of their clients and employers. It may be added in this connection, that, in a recent English case, a bill by an attorney against his client for specific performance of a contract of sale, the attorney having bought at an auction, and having been professionally employed in the sale, was dismissed with costs.² So it has been recently held, that an attorney cannot sustain his purchase from a client, unless he can prove that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger.³ And the relation of attorney and client was in this case held to continue, although the attorney had not acted as such for the vendor for more than a year previous to the purchase, (but prepared the purchase agreement, and charged accordingly,) he having previously been employed as attorney about an attempted sale of the same property.⁴ So the sale from

¹ *Fisher v. Bridges*, 18 Eng. L. & Eq. 358, 361.

² *Cutts v. Salmon*, 12 Eng. L. & Eq. 316.

³ *Holman v. Loynes*, 27 Eng. L. & Eq. 168.

⁴ *Ibid.*

a client was set aside, on the ground that the consideration, an annuity, ought to have been considerably greater, by reason of the intemperate habits of the vendor, although the vendor, acting under the advice of an auctioneer, named the price and pressed the attorney to purchase.¹ But, where the same solicitor was employed by the vendor and purchaser, and the purchaser paid his purchase-money to the solicitor, and was afterwards deprived of the benefit of his purchase by parties having a prior equitable mortgage, which was known to the solicitor at the time of the purchase; it was held, that the Court had no jurisdiction, on petition of the purchaser, to order the solicitor to pay, out of the purchase-money, the amount of the equitable mortgage, as the money was not paid to him as the solicitor of the petitioner, but of the vendor; and that it had no jurisdiction, on petition, to order the solicitor to make compensation to the purchaser for the loss sustained through his negligence.²

19. Where an attorney purchases in for his own benefit a title adverse to that of his client, he is not liable to an action in favor of a subsequent grantee of his client.³

20. With regard to the general responsibility of an attorney in reference to *the title* of land bought and sold, the following remarks are made by Bayley, J., in the case of *Ireson v. Pearman*,⁴ where the attorney of a vendee was employed to investigate the title, and, in taking the opinion of counsel thereon, omitted to state in the case certain deeds materially affecting the title, and, upon the faith of the opinion given, (which would have been different, had all the deeds been stated,) the vendee concluded the purchase, but was afterwards damnified by finding that the title was imperfect. Held, the attorney was liable to him in an action for negligence. "The defendant laid a case before counsel, but he chose in that case to assume the fact that Malin was

¹ *Holman v. Loynes*, 27 Eng. L. & Eq. 168.

³ *Cowan v. Barret*, 18 Mis. 257.

² *Tylee v. Webb*, 7 Eng. L. & Eq. 281.

⁴ 5 Dowl. & Ry. 687, 699.

seized in fee, instead of setting out the deeds themselves which would at once have shown that Caldecott had an estate for life. Now, without going the length of saying that it is the duty of an attorney to know the legal effect of conveyances, it certainly is his duty either to draw right conclusions from the deeds laid before him, or to lay the deeds themselves before his counsel; and if he withholds the deeds, and draws a wrong conclusion, he does it at his peril. There is one other circumstance from which we think negligence may be inferred. The defendant received the abstract of the title in February, 1818. That abstract contained no notice of the deeds by which Caldecott conveyed the estate to Mrs. Wagstaff; but when he received those deeds, which was before any conveyance was made to the plaintiff, he did not lay them before Mr. Preston, and inquire whether they made any alteration in his opinion; which they certainly would have done, because if Malin had really been seized in fee, Caldecott could not have had any thing to convey." So, on a bill to make an attorney responsible, for recommending bad security, the Lord Chancellor said: "If any thing is to be imputed to the defendant through negligence, he will be subject to damages for it at law; if through fraud, this Court is proper to relieve." No fraud appearing, the bill was dismissed.¹ (a)

¹ *Brooks v. Day*, 2 Dick. 572.

(a) An attorney employed to purchase and prepare the assignment of an annuity, before the decisions holding that the trusts in annuity deeds must be particularly set forth in the memorial, is not liable for negligence in not having pointed out to his employer that the annuity purchased was void, because the memorial omitted particularly to specify the trusts of the annuity deeds. *Baikie v. Chandless*, 3 Camp. Ca. 17.

CHAPTER XLIII.

MISCELLANEOUS POINTS OF PRACTICE.

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|--|------------------------------|
| 1. Payment of purchase-money into Court, and the disposal thereof. | 14. <i>Ne exeat regno</i> . |
| 6. Security for purchase-money. | 20. Production of deeds, &c. |
| 10. Injunctions. | 23. Arbitration and award. |

1. QUESTIONS sometimes arise, in reference to the exercise of the authority of the Court over purchase-money paid to the vendor, or the disposition of purchase-money paid into Court. (See Vol. 1, p. 451.)

2. The Court will not compel a vendor to pay the deposit-money into Court, though he retains possession of the estate, if the delay in the completion of the contract is occasioned by the purchaser.¹

3. In a suit for payment of creditors, the real estates of the testator were ordered to be sold. The party reported purchaser of one of the estates entered into possession, and accepted the title, and proper conveyances were executed. On application by the creditors to have the purchase-money paid out, the purchaser stated, that the tenants had been served with a writ of right by a person who was claimant of the whole estate under an adverse title. Held, the Court could do no more than give possession, and a conveyance under a title satisfactory to the purchaser himself; and after this he had no right to object to the application of the purchase money; and the Court ordered accordingly.²

4. An estate sold under a decree was described as of a certain annual value, and, by the conditions, compensation was to be made for any error in the particular. The purchaser

¹ Wynne v. Griffith, 1 Sim. & St. 147.

² Thomas v. Powell, 2 Cox, 394.

paid his money into Court, was let into possession, and took a conveyance. After he got into possession, he discovered that the rent was overstated in the particular. Held, he was entitled to a compensation out of his purchase-money.¹

5. A vendor, resisting an application by the purchaser for payment into Court of the deposit, in the hands of the vendor's agent, was charged with a loss by the agent's failure.²

6. Equity may also act upon the question of *security* for the purchase-money of land sold.

7. Upon a motion for an injunction to stay proceedings at law, it appeared that the defendant had agreed to purchase an estate from the plaintiff for £100; and for an annuity for her life; but it was not specified what security should be given for the annuity. The defendant offered his bond and judgment. Held, the annuity should be secured by charge upon the estate, as well as by the bond and judgment.³

8. An agreement to purchase land for an annuity for the life of the vendor, to be a charge on the land, and to be paid quarterly, entitles the vendor not only to the charge, but to the covenant of the purchaser for payment of the annuity.⁴

9. A vendor, having lost his title-deeds, agreed to give the vendee a real security against such loss. On a bill for specific performance, he stated he had not real property sufficient for such security, but offered ample personal security. Held, he was bound to procure a sufficient real security.⁵

10. The equity power of *injunction* is sometimes exercised as between vendor and purchaser.

11. Where the defendant is in Maryland, but the land in controversy in Virginia, and it is sought to vacate a decree of a Court in Virginia, though this cannot be done, yet the defendant, seeking to enforce such decree, may be enjoined from accepting a conveyance of lands purchased by him under it, or, if he has inequitably obtained title, may be decreed to reconvey.⁶

¹ Cann v. Cann, 3 Sim. 447.

² Fenton v. Browne, 14 Ves. 144.

³ Remington v. Deverall, 2 Anstr. 550.

⁴ Bower v. Cooper, 2 Hare, 408.

⁵ Walker v. Barnes, 3 Madd. 247.

⁶ Buchanan v. Lorman, 3 Gill, 52.

12. After dismissal of a bill for specific execution of an agreement, the plaintiff being unable to make a good title, an injunction to restrain him from proceeding at law was granted on motion; the defendant undertaking forthwith to file a bill.¹

13. A vendor covenanted that no building except tombs should be erected on any part of his land, opposite to the land sold. Subsequently, he sold part of the opposite land, and the purchaser built on it, without objection by the former purchaser. Afterwards, the vendor sold a further part of the opposite land, and the new purchaser commenced building. The original purchaser filed a bill for an injunction, to restrain the defendant from building on any part of the land of the original vendor, or the opposite land; but it was dismissed, the Court holding, that the covenant extended only to the lands of the original vendor exactly opposite to the land sold to the plaintiff.²

14. An injunction will lie against a purchaser, on behalf of creditors, to restrain payment to the heir.³

15. The Chancery process of *ne exeat regno* is sometimes applied between vendor and purchaser.

16. Bill to have a specific performance of an agreement, and that the defendant might pay £1,900, the remainder of the purchase-money, £100 having been paid. The defendant threatening to go abroad, a writ *ne exeat regno* was granted, to be marked in the sum of £300.⁴

17. The Court refused to discharge a writ of *ne exeat regno* issued against the purchaser, and marked for the full amount of the purchase-money, though the abatement, (which it clearly appeared would be less than the interest) had not been ascertained by the Master, and no steps had been taken towards the execution of the conveyances. The sheriff, having taken the defendant under the writ, refused

¹ McNamara v. Arthur, 2 Ball & B. 349.

² Patching v. Dubbins, 23 Eng. L. & Eq. 609.

³ Green v. Lowes, 3 Bro. C. C. 217.

⁴ Goodwin v. Clarke, 2 Dick. 497.

to release him until the whole sum, for which the writ was marked, was paid into his hands, and the Court did not disapprove of his conduct.¹

18. But, to entitle the complainant to a writ of *ne exeat*, upon a bill for specific performance of a contract, against the vendee, he must show a debt actually due; and must therefore show affirmatively that he is able to make a good title.²

19. In a suit for specific performance by a vendor, a writ of *ne exeat regno* ought not to issue, unless the Court deems it quite clear that there must be a decree for specific performance. Thus it was refused, though the purchaser had taken possession and received the rents after delivery of the abstracts.³

20. Where a covenant in an agreement for a lease was broken, and a verdict obtained for £500 as damages for the breach, but the plaintiff in the action died before the judgment was perfected, so that the damages were lost at law; the Court, on a bill by his representatives for specific performance of the agreement, refused a writ of *ne exeat regno* for the amount.⁴

21. The production of title-deeds and other papers is sometimes required by the Court, as a condition of enforcing specific performance. (See Chap. 15.)

22. A reversion having been put up to sale by auction, describing the estate as leased, with a covenant on the part of the tenant to repair; and the purchaser objecting to the title, because no counterpart of the lease was in possession of the vendors, it being stated to be in the hands of a party under a partition made some time before; the Court thought that such counterpart ought to be deposited for the benefit of all parties, before it could compel the purchaser to take.⁵

23. Specific marriage articles limited a joint estate to the

¹ Boehm v. Wood, Turn. & R. 332.

² Brown v. Haff, 5 Paige, 235.

³ Morris v. McNeil, 2 Russ. 604.

⁴ Jenkins v. Parkinson, 2 Myl. & Kee. 5.

⁵ Shore v. Collett, Coop. 234.

intended husband and wife, and after the death of the survivor to the use of the heirs of the body of the husband begotten on the wife; and the settlement after marriage pursued the words of the articles. The husband and wife levy a fine and first mortgage, and then agree to sell. The articles not being produced, the Court would not decree them to be carried into execution by a strict settlement, against the purchaser, who had no notice of them.¹

24. We have already had occasion (Chap. 25, s. 34; Chap. 35, s. 19,) to speak of the effect of an *arbitration and award*, in reference to the rights and obligations of vendor and purchaser. A few additional points remain to be noticed in the present connection.

25. A bill lies, to compel specific performance of an award to convey an estate, where the party has received the consideration.²

26. Stipulation, that the title to lands sold should be made out to the satisfaction of a third person. A dispute as to the title was referred to an arbitrator, with power to settle all questions arising out of the agreement, who awarded that the title should be taken, with a bond of indemnity in case of eviction. Held, the award was bad, because the arbitrator had exceeded his authority in ordering a bond, and had not decided upon the validity of the title.³

27. Under a contract for sale, at a price to be fixed by an award within a limited time during the lives of the parties, the death of one is not an *accident*, against which the Court will relieve.⁴

28. If the terms of an agreement are to be ascertained by an award, being so ascertained, it shall be specifically performed if any thing is to be done in specie; such as a conveyance, &c. But not if the acts done towards executing it by an award are not valid at law, as to the time,

¹ Cordwell v. Mackrill, Ambl. 515.

² Hall v. Hardy, 3 P. Wms. 187.

³ Ross v. Boards, 3 Nev. & Per. 382.

⁴ Blundell v. Brettargh, 17 Ves. 232.

manner, or other circumstances; unless there has been acquiescence, notwithstanding the variation of circumstances, or part-performance.¹ (a)

¹ *Blundell v. Brettargh*, 17 Ves. 232.

(a) It is said, there is no case at law or in equity, that, if an award is not made at the time and in the manner stipulated, the Court have substituted themselves for the arbitrators, and made the award; even where the substantial thing to be done was agreed by the parties, but the time and manner left to others to prescribe. So also, that there is no instance where, the medium of arbitration for settling the terms of a contract having failed, this Court has assumed jurisdiction to determine, that there is a contract, though not at law, in equity; which, though the parties never agreed to it, shall be specifically executed. *Blundell v. Brettargh*, 17 Ves. 232.

APPENDIX.



APPENDIX.

THERE are various topics treated in the foregoing pages, upon which much discussion and difference of opinion is found in the reports, only the general or prevailing result of which it has been found practicable to state, within the prescribed limits of the present work. In relation to these controverted points, it will be useful to cite at greater length some of the latest leading cases, which often contain in themselves a comprehensive abstract of the earlier decisions upon the same subjects.

Vol. I. p. 1, note. *Agreement to Devise Real Estate.*

The following very late English case establishes an important distinction, as to the terms of communication which are necessary and sufficient to create this somewhat anomalous and unusual liability.

The guardians of a lady refused their assent to a proposed marriage, except on condition of a marriage settlement. The proposed husband thereupon applied to an uncle, of whom he had expectations, who replied by letter that he had made his will, and given his nephew a large estate. The guardians not being satisfied, they renewed the application, to which the uncle replied by letter, that his will was made, and he was confident he should never alter it to his nephew's disadvantage, but that he would not put any part of his property out of his power. This answer was communicated by the intended husband to the guardians, and the marriage agreed to. The uncle after-

wards altered his will, leaving nothing to the nephew, and after his death this suit was brought against his estate. Held, the facts did not prove a contract to leave the estate mentioned in the letters to the nephew. Lord Chancellor Cranworth says (in substance): "The appellant paid his addresses to his cousin; he had an uncle, an old bachelor, with a large property; he himself had but little money; the guardians of the young lady were opposed to the marriage unless he could make a good settlement in her favor; and under these circumstances, having received kindnesses from his uncle, and believing that his uncle was willing to befriend him, he addresses a letter to the uncle, who says, in answer, that he is glad to see that his nephew, the appellant, is about to be well married, and that he has left his Tipperary property to the appellant. That was a very vague answer; and the trustees and guardians wished for a more specific declaration. We have not the letter communicating this wish, but we have the answer,—'I shall never settle any part of my property out of my power so long as I exist.' Nothing can be clearer or more strongly expressed than this resolution. I think the attempt afterwards to spell out of this letter a representation which is to be construed into an engagement or a contract, is altogether unsatisfactory. To say that in this same letter the party binds himself to make a settlement of his property, when he merely says that the Tipperary estates will come into his nephew's possession after his death, 'unless some unforeseen occurrence should take place,' does seem to me to be an attempt to put a construction on words which their natural meaning will by no means warrant. Then Mr. Eyre, the uncle, says: 'My will has been made for some time,' a fact which we must assume to be true, and which is itself an answer to the application to make at that time a settlement in the nephew's favor. Then the uncle goes on: 'I am confident I shall never alter it to your disadvantage; and I repeat, that my Tipperary estates will come to you at my death, unless some unforeseen occurrence should take place.' He says in substance, I am now on good terms with you; I will not bind myself to do what the trustees ask; I have made my will, and that will remain as it is, unless some unforeseen occurrence should happen. The marriage, with the consent of the guardians, took place, they thinking, as they say, that the letter was equivalent to a contract. The trustees objected to the marriage; they discussed the youth of the lady, and other circumstances; and the marriage did not in fact

take place till nearly twelve months after the letter. If they relied on this letter as a contract, I think that common honesty required that they should distinctly have brought that circumstance to the uncle's knowledge. They should have said: 'What is it that you mean? is this intended as a promise which is to be binding upon you, or is it merely an expression of kindness and good will?' They do nothing of the sort; but after some time, they proceed to make a settlement. The young man covenants that he will settle this property if he gets it; and they accept that covenant. Of course, all that he could do was to undertake to settle whatever he might afterwards receive under this letter; he did so covenant, and they took that covenant."

The Lord Chancellor proceeds to distinguish this case from that of *Hammersley v. De Biel*, 12 Cl. & F. 45, upon the ground that *there was a contract* to leave a sum of money, whereas here was nothing more than *a representation* on which the parties were said to have acted. He remarks, (p. 11,) "Suppose that this gentleman had on the eve of the marriage said so the appellant: 'You may safely enter into this marriage, for I have executed a deed by which I engage to leave you such and such estates.' If, on the faith of that representation, the nephew had married, the uncle would then have made a representation on which he knew that the nephew would act, and it would be a fraud on the nephew, or on those who dealt with him, and came after him, to set up as an answer that that was a mere intention which he had entertained at the time. The uncle would, in fact, have made a contract, and he would be compelled to make it good, for he would have made a representation with a view to induce others to act upon it, and on the faith of it they had, at the moment, acted. There is no middle term, no *tertium quid* between a representation so made to be effective for such a purpose and being effective for it, and a contract; they are identical." *Mannsell v. White*, 31 Eng. L. & Eq. 1, 9.

Chap. I. p. 1. *Executed and Executory Agreements.*

Interesting questions have recently arisen, with reference to the rights and liabilities of *public corporations*, growing out of *executory agreements* for the purchase of real estate.

Agreement between one A. and a railroad company, that he should convey to them certain land, being part of a large tract belonging to him, and that the company should erect a depot thereon. Afterwards the lot in question, and most of the entire tract, was sold and conveyed by the sheriff to B.; and subsequently B. and A., who claimed some interest in the land, conveyed it by separate deeds to the company, in which deeds, after the description of the premises, was added, "for the purposes and use on which to erect a permanent depot for the accommodation of steam-engines, &c., in compliance with the contract made between the parties under date, &c." Held, this was not a covenant nor the revival of the agreement, but a mere declaration of the use or purpose to which the lots conveyed were meant to be applied. *Sayer v. Harlem, &c.* 3 Duer, 54.

It has been recently decided in Connecticut, that, where an unexecuted contract for the purchase of real estate for a public purpose, as a highway, railroad, &c., is abandoned by the vendee, and the vendor retains possession, his remedy is not in equity, but at law. Bill in equity to enforce a contract, by which the city of New Haven agreed to purchase of the plaintiff certain lands, and as much of the water of Mill River as should be required to supply the city with pure water, for the consideration of \$50,000, and of a covenant to construct a costly dam and a canal to convey for the plaintiff's use the surplus water of the river. The plaintiff retained possession of the property. Held, the suit could not be maintained, there being a complete remedy at law. Ellsworth, J., says: "Our statute, as well as common law, forbids a party, that can obtain complete redress at law, to seek redress by specific execution. True it is, that, as a general rule, where the purchaser of real estate can come into a Court of Equity, to obtain a deed of it, the vendor can come there to get his money, which was agreed to be paid, but the rule is not universally true, and it should not be applied, we think, where it will do unnecessary mischief to one of the parties. This is a case of that character. The plaintiff not only asks to recover his money, but he seeks to compel the city to construct, at a great expense, their water-works, with a dam thirty-three feet high, for an immense pond, or reservoir of water, with a canal, for surplus water for the plaintiff's works; or if the plaintiff will be satisfied, as he may be, to take a decree only for the fifty thousand dollars, and not pursue the rest of his prayer, then, we say, that the remedy is unequal and oppressive, and will not

leave the parties where they should be left, and where they will be left, after a recovery of damages, at law. Is it not more equal and just, that the plaintiff should recover his damages, whatever they may be, and retain his property, as it is, than to force the city to pay fifty thousand dollars, and go on with the water-works, whether they will use them or not; or, if the works are not to be constructed, to pay Mr. Whitney the fifty thousand dollars, and leave him, as they necessarily must do, in that case, in the undiminished enjoyment of the whole of this same property. The truth is, the city get nothing at all for the fifty thousand dollars, nor is the plaintiff to part with anything for it. In *Webb v. The London and Portsmouth Railway Company*, 9 Eng. L. & Eq. 249, on appeal, the defendants had entered into an agreement to purchase certain lands, not exceeding eight acres, for a proposed railroad, and to pay £4,500 for them, but which was not taken, though the defendants entered to make a survey, and estimate, and cut one tree, and the plaintiff was not otherwise disturbed in his possession and enjoyment; the Court held, that the plaintiff was not entitled to a specific performance; their language is, "It is the plain doctrine of the Court, that it is not upon every contract that the Court will interfere to decree specific performance. It does so, to give more complete justice to a party, who seeks the aid of this Court, where a contract has been entered into to purchase an estate. It may often happen that the mere legal remedy of recovering damages, for the non-performance of the contract would afford inadequate relief, and, from the earliest time, it has been the doctrine of this Court to interfere to make the party do what he has engaged to do, namely, convey the land he has agreed to sell." "But even in the case of a suit by a purchaser, if there be circumstances, rendering it unjust that the Court should interfere, the Court will not interfere in his favor; and I should say, much more readily will the Court listen to an objection, that is made against a vendor seeking a specific performance; because of necessity the vendor can get complete redress at law."—"But here it is admitted that what the contract amounts to is really this: a contract to pay £5,500, to select eight acres of the plaintiff's land and take it from him, and for such land, and consequential damage, to pay the £4,500."—"The amount of damages to be calculated will then, as I conceive, be a calculation made on the agreement, as to what, taking all the circumstances into consideration, will do justice; whereas, the relief that would

be afforded in this Court would be positive injustice. It would be giving to this gentleman £4,500 as the purchase-money for that which they had not taken, and which I believe they never can take.' The same is decided in *Stuart v. The L. N. W. R. R. Co.*, 11 Eng. L. & Eq. 112. Lord Cranworth says: 'The ground on which we proceeded in *Webb, &c.* was this: that, whether it was a contract or not, the circumstances of the case made it such, that it was not fit for this Court to interfere by way of specific performance, because these two circumstances conspired; first, that complete relief might be obtained at law, if the parties were entitled to any relief, and, secondly, the principle of mutuality wholly failed, for it was impossible for the company to hold the land for their benefit, in consideration of the money they were to pay.' So in *Gooday v. The C. & S. V. R. R. Co.*, 15 Eng. L. & Eq. 596,—where the company had not taken possession of the land, and had abandoned forever the project contemplated,—the Master of the Rolls says: 'Had there existed any such contract, then it has been settled, as a rule of law, by recent cases, that assuming a contract to have existed between an individual and a railway company, and if the undertaking had been abandoned, the Court will nevertheless, in the exercise of its discretion, send the case to law.' " *Whitney v. New Haven*, 26 Conn. 624, 631.

Vol. I. p. 4.

In regard to the *equitable ownership* of a purchaser before actually taking a conveyance, it has been recently held in Pennsylvania, that, although a purchaser has not paid the purchase-money, he is still the owner in equity, subject to the liability for such payment. The Court say: "When a part of the purchase-money is paid, the interest of the purchaser in the land is not circumscribed by the extent of the money paid, but embraces the entire value of the land over and above the purchase-money due. He is treated as the owner of the whole estate, incumbered only by the purchase-money. If the land increase in value, it is *his* gain; if it decrease, if improvements are destroyed by fire or otherwise, it is *his* loss." *Siter's Appeal*, 26 Penn. 178, 180.

Vol. I. p. 14. *Contract requires Acceptance.*

Upon the distinction between a *contract* and a mere *offer*, the following case lately occurred in England :—

Parties wishing to construct a railroad, on the *way-leave* principle, entered into negotiations with a land-owner, and proposed terms, which were discussed but not agreed to; but the company proceeded to make the road. Held, the land-owner's acquiescence did not amount to an acceptance of the terms proposed. *Meynell v. Surtees*, 31 Eng. L. & Eq. 475.

In the same case, an iron company, the owners of a railway, wishing to make, on the principle of *way-leave*, a branch of their road to connect it with other roads, applied to the several land-owners, including one A., for the necessary *way-leaves*, and received a proposal from them that, as they wished to procure Stanhope lime for agricultural purposes, and believed the railroad would be of great advantage to the district, &c., they offered the iron company *way-leaves* over their property on lease for sixty years, by payment of triple damages yearly. This proposal was signed by A. and accepted by the company, who thereupon agreed with the plaintiffs, directors of another railway, who were to make the line. The railway company took possession according to the offer, and the railway was made at great expense, with the knowledge and without any objection of the land-owners. Held, there had been a variation in the parties and subject-matter of the offer, by changing a railway made for mineral traffic into one for general public conveyance. Also, that the instrument signed by A. contained no such acceptance of the offer as bound the land-owners to grant a lease at a rent on the principle of triple damages. Lord Cranworth, Lord Chancellor, remarked: "It does not purport to be a contract upon the face of it. It is a mere offer that they will give way-leaves upon certain specified terms; and if the parties to whom that offer was made had accepted it, and said: 'We agree to that,' or if they had either done so by writing, or had, without writing, by word of mouth said, 'We will act upon it,' and had taken it, no doubt this Court might have treated that as a contract, but an offer is a very different thing. When I offer any thing to a person, what I mean is, I will do that if you choose to assent to it; meaning, although it is not so expressed, if you choose to assent

to it in a reasonable time. Whether that is expressed or not, such an offer, I should say, undoubtedly, even at any time, if it is not promptly accepted, is evidently from the nature of things revocable." *Meynell v. Surtees*, 31 Eng. L. & Eq. 475, 479.

Vol. I. p. 21. *Consideration.*

With regard to the consideration of a contract connected with the sale and purchase of land, it has been lately held, in Pennsylvania, that the promise of a vendor to indemnify the vendee for his improvements, if the title warranted fails, is founded on sufficient consideration, and *assumpsit* lies upon it. The Court say: "As things turned out, neither of the parties received any benefit from the improvements; but that was not the plaintiff's fault. To make a promise binding in law, it is not necessary that the promisor should derive any advantage from it. It is enough that the promisee has encountered trouble, assumed a burden, or suffered a loss. Here was a person making a purchase of land. He had so little faith in the title that he would neither pay the purchase-money nor make improvements which were necessary to its profitable use without some guaranty against the ultimate loss of his whole outlay. But he had confidence in his vendor, and was willing to accept his personal warranty in place of a good title. It does not seem to us that it makes any difference whether the contract concerning the improvements was made before or after the date of the deed. The deed did not alter the situation of the parties, or make any change in the title, for the grantor had no title to convey. The conditions or terms of a sale, and the quantity of estate granted are to be looked for in the final deed of conveyance, and not in any articles of agreement which may have preceded it. But to us it appears that the contract on which this suit is founded has no such relation to the deed referred to. It does not concern the sale or the transfer of the title. It is a promise to do another thing. The consideration is wholly distinct, and the subject of the contract is a different thing." *Richardson v. Gosser*, 26 Penn. 335, 336.

Vol. I. p. 56 ; Vol. II. p. 191. *Contracts by Husband and Wife.*

As has been seen, contracts to sell land, made by husband and wife, have given occasion to many conflicting decisions. In the late case of *Clarke v. Reins*, 12 Gratt. 98, it was held that equity will not decree specific performance of a contract by husband and wife to sell her land, as against her. Nor will it compel him to convey his life estate, with compensation for the loss of her estate. Daniel, J., (p. 105,) gives the following view of the decisions upon these points: "The question whether a Court of Equity will, under any circumstances, decree against *a husband* the specific performance of a contract on his part to procure the conveyance by his wife of her real estate, is one which cannot be regarded as yet definitively settled in England. In the reports of the earlier cases, numerous precedents may be found in which the power of the Chancellor to make such decrees has been asserted and enforced. Thus, the case of *Hall v. Hardy*, 3 P. Wms. 187, in which, upon a submission of a dispute touching the fee simple of a parcel of land, the arbitrators awarded that the defendant should procure his wife to join with him in a fine and deed of uses, and thereby convey the premises to the plaintiff and his heirs, the Master of the Rolls, Sir Joseph Jekyll, decreed a specific performance of the award; prefacing the decree with the remark that there had been a hundred precedents, where if the husband, for a valuable consideration, covenants that the wife shall join with him in a fine, the Court has decreed the husband to do it. In some of the cases of a later date, however, the propriety of making such decrees has been seriously questioned, and in others, positively denied; as in *Emery v. Wase*, 8 Ves. R. 505; *Davis v. Jones*, 4 Bos. & Pull. 267; and *Martin v. Mitchell*, 2 Jac. & Walk. 413. And whilst it cannot perhaps be said that the English Chancery has fully disclaimed the power, it may, I think, be safely affirmed, that the current of professional feeling and sentiment in England is rapidly tending to a conviction of the impolicy, cruelty, and unfairness of a rule which constrains the wife indirectly through the sufferings of the husband, to do that which the Courts have long since repudiated their right to coerce her to do directly. In the case of *Emery v. Wase*, Lord Eldon said, that the argument showed 'the point was not so well settled as it was understood to be. The policy of the law is,

that a wife is not to part with her property but by her own spontaneous and free will. If this was perfectly *res integra*, I should hesitate long before I should say the husband is to be understood to have gained her consent, and the presumption is to be made that he obtained it before the bargain, to avoid all the fraud that may afterwards be practised to procure it. The purchaser is bound to regard the policy of the law, and what right has he to complain if she, who according to law, cannot part with her property but by her own free will, expressed at the time of that act, of record, takes advantage of the *locus penitentiæ*; and why is he not to take his chance of damages against the husband?" See also 1 Rep. H. & W. 547-8; 1 Bright, 191; *McCann v. Janes*, 1 Rob. 256; *Evans v. Kingsberry*, 2 Rand. 120; *Watts v. Kenney*, 3 Leigh, 272.

Vol. I. p. 64, and note. *Contract by Agent.*

With regard to the validity of a deed of land made by an agent, in the case of *Gage v. Gage*, 10 Fost. 420, it was held, that a power of attorney to convey, in order to make the deed effectual, ought to be as certain as the deed itself is required to be; as, for instance, to be attested by two witnesses, the deed being required by statute to be thus attested. Eastman, J., gives the following view of previous decisions upon this subject, (p. 423): "In *Lumbard v. Aldrich*, 8 N. H. 31, it was held, in general terms, that a power of attorney ought to be as certain as it is necessary for the deed to be which is to be executed under it. But the particular formalities required in the execution of a power of attorney were not specially considered. In *Montgomery v. Dorion*, 6 N. H. Rep. 252, it was said by Parker, J., that the statute indicates that powers of attorney were intended by the Legislature to be placed on the same ground as the deeds which might be made under them. And the remarks of the Court in *Southerin v. Mendum*, 5 N. H. Rep. 428, are of a like import. In *Society for Propagating the Gospel v. Young*, 2 N. H. Rep. 312, Woodbury, J., appears to express the opinion that a power of attorney should be as formal as the deed. Story, in his work on Agency, after

laying down the rule that an agent or attorney may ordinarily be appointed by parol, says that one exception is, that, wherever any act of agency is required to be done in the name of the principal, *under seal*, the authority to do the act must be conferred by an instrument under seal. Thus, for example, if the principal would authorize an agent to make a deed in his name, he must confer the authority on the agent by a deed. A mere unsealed writing will not be sufficient to make the execution of the deed valid at law, though the Court of Equity might, in such case, compel the principal to confirm and give validity to the deed. Story on Agency, ch. 5, p. 48, 50. These authorities, it will be perceived, do not come precisely to the point raised in this case, although they have a general bearing upon it.

"The case of *Clark v. Graham*, 6 Wheat. 577, has a direct application. It was there held that a power to convey lands must possess the same requisites and observe the same solemnities as are necessary in a deed directly conveying the lands.

"This is the only case that we have met with that is directly in point. But we think that the rule as there stated is the correct one, and that such should be the doctrine in a Court of Law. An agent should not have the power to do an act where the instrument giving him the power is incomplete—where it lacks a requisite which would be essential in performing the act itself. Should it at any time appear that the principles of good conscience would be infringed by this rule, equity might, perhaps, interfere to make such decrees as would be deemed right."

In conformity with the general rule stated in the text, as to the validity of a verbal authority to sell, given to an agent; it was held, in the case of *Newton v. Bronson*, 3 Kern. 587, that, although an executor or other trustee cannot authorize an agent to sell, the trust being a personal one; still the principal may subsequently ratify such sale. Also, that an agent may validly sell lands without authority in writing, and such sale made by the agent in the name of the principal may be validly ratified by the latter, by parol. But, where the principal could not delegate authority to make the contract, the ratification must be in writing, and in such form as would have been valid if he had made the contract.

Vol. I. p. 78. *Auction.—Puffing.*

It has been held in a late case in Missouri, that it is not fraudulent for a debtor to employ a person to buy in his property at sheriff's sale, merely to prevent a sacrifice. *Lee v. Lee*, 9 Mis. 420.

Vol. I. p. 81. *Auction.—Unlawful Combination.*

Upon the subject of a combination to reduce the price of property sold at auction, it has been lately held in Pennsylvania, that an agreement of a bidder at sheriff's sale, to pay the judgment of a creditor if he would refrain from bidding, is fraudulent and void. *Slingluff v. Eckel*, 24 Penn. 472. Black, J., says, (p. 473): "Can this contract be enforced? Is it not against public policy as well as good morals, and therefore void? We all think it is. A debtor, whose property is taken in execution, has a right to have it sold for the highest price that it will bring. If two persons be present who are both willing to give a certain sum, and one of them pays to the other a portion of what he would otherwise bid for the land, the owner is cheated exactly to that extent. The debtor not being a party to the contract, nor assenting to it, we cannot perceive that it makes any difference whether the person thus bought off be a volunteer, expecting to pay his bid in cash, or a lien-creditor desiring to purchase, in order to save himself. Either way the debtor's interest may be sacrificed. Besides, there may be other creditors whose rights would be affected by it. The point has never before been directly ruled in this Court, but we have often declared the general principle that all judicial sales must be open to free and fair competition. In more than one case we have decided that any device by which the purchaser at sheriff's sale gets land at an under price is a fraud, which will make his title totally void. It certainly follows from this that a contract to do that which must necessarily result in lowering the price and so defrauding the debtor or his creditors, must be void also. In several of the other States there have been cases so nearly like this that they are

not to be distinguished. It is sufficient to mention *Jones v. Caswell*, 2 Johns. Cas. 29, and *Thompson v. Davis*, 13 Johns. Rep. 112. It is not now proper to decide how far several persons, who would otherwise bid against each other at sheriff's sale, may associate themselves together, unite their interests, and allow one to bid for all. What we do decree is, that one bidder cannot legally buy off another with money or the promise of money."

In the same State it is held, that a declaration made by a purchaser at sheriff's sale, that he is buying for the benefit of the debtor, intending to give him the property, if true, is not fraudulent, although it reduces the price of the property. *Dick v. Cooper*, 24 Penn. 217. Black, J., says, (p. 221): "To avoid the title of a purchaser at sheriff's sale, it is necessary to show that he was guilty of some deception. Where one is buying for himself, but falsely declares that his purchase shall enure to the benefit of the debtor or his family, and this is done as a mere trick to prevent competition, and thus get the property at an under price, he acquires no title. But to say that he intends to give it to the debtor or let him redeem it, when such is really his intention, is no fraud. It is generous—perhaps it is imprudent—but imprudent generosity is not a crime. One who chooses to run the risk may lawfully buy in property for a debtor and leave it with him on any sort of contract he chooses to make. If it be lawful to do a thing, it cannot be wrong for a man to say openly and candidly that he intends to do it. We have decided lately, in several cases not yet reported, that to make the purchase void it must be proved that the property was obtained at an under value, and by means of a false representation."

In a late case in Illinois, at a commissioner's sale under a decree for partition, the purchaser publicly asserted a claim to the property, and threatened to litigate it, and thereby prevented parties from bidding as much as they otherwise would. Held, a fraud for which the sale should be set aside. *Scates, J.*, says: "If he desired to become a bidder, it was essential to fairness towards the petitioner that he should conceal or forbear to assert his adverse claim, whatever consequence might result therefrom to his interest. It is not competent for him to assert his claim to the premises by a public announcement at the biddings, with a threat to litigate it with any purchaser, and then enter into competition in the biddings, and purchase at an under value occasioned by the depreciation his own conduct had produced.

If it were essential for the protection of his claim to give notice and make it known at the sale, he thereby disqualified himself to bid or become a purchaser of this adverse title at such sale. He shall not be allowed to depreciate or destroy the value of the land by denying the title, then buy it at a depreciation thus produced; and claim to be a fair purchaser." *Coffey v. Coffey*, 16 Ill. 141.

Vol. I. p. 104. *Statute of Frauds.—Trees.*

It has been seen, that great diversity of opinion has prevailed, as to the application of the Statute of Frauds to the sale of growing products of the soil. In the late case of *Buck v. Pickwell*, 1 Wms. (Verm.) 157, it was held, that an agreement for the sale of *growing trees*, with a right in the purchaser at any future time to take and cut them as he may want them, is within the Statute of Frauds; that no action lies upon it, nor, while executory, can it in any way be made available as a contract. If made for valuable consideration, the vendee has a valid title to any trees which he may cut; but not such a title to those which remain, he not having taken exclusive possession of the land, as will sustain an action against one who enters and cuts and carries away trees; although the vendee have paid the full consideration. It was further held, that an exception in a subsequent conveyance of the land, of the trees previously sold, is not a sufficient memorandum within the statute. Bennett, J., says, (p. 163): "It may, perhaps, with some degree of certainty be said, that at the present day, a contract for the sale of growing crops, produced annually by labor and the cultivation of the earth, and which are included within the meaning of the term 'emblems,' is not a contract for the sale of land, or any interest in it, or concerning it, and that it is not material whether they have come to maturity or not at the time of the sale; or whether they are to be cut and taken off of the ground by the vendor, or the vendee. There would seem to be some reason for making a distinction between a growing crop of grass or growing trees, and a field of wheat or corn or other emblems. Emblems seem to be distinct from the real estate, and subject to

many of the incidents attending personal chattels. But the word *land* is comprehensive in its meaning, and comprehends growing grass and standing trees. Standing trees must be regarded as part and parcel of the land in which they are rooted. The case of *Dunn v. Ferguson*, cited in 2 Steph. N. P., from Hayes (Irish) 542, marks well the distinction, and the grounds upon which the sale of a growing crop is not a contract for an interest in land. The case was, the defendant sold, by verbal contract, to the plaintiff, a crop of turnips, which he had previously sown; and some time after, and while the turnips were in the ground, the defendant dug them and carried them away. Chief Baron Joy says: ‘Whether there has been a contract concerning an interest in land, or whether it merely concerns goods and chattels, must depend upon the question, whether a growing crop is goods and chattels;’ and upon this, he says, ‘the decisions have been very contradictory, a result always to be expected when the Judges give themselves up to fine distinctions.’ The Court in that case, base their decision upon the ground that at common law, growing crops were uniformly held to be goods, and subject to all the leading consequences of being goods, and that the Statute of Frauds took things as it found them, and provided for lands and goods according as they were esteemed at the time of its enactment. This seems to put the case on some tangible ground. If before the statute, a growing crop had been held to be an interest in lands, under the statute, a contract respecting it must have been to give it vitality, in writing. We think the whole current of modern law is in conformity to the distinctions marked out in the case of *Dunn v. Ferguson*, and it is thus put upon some rational ground. It would seem to follow as a necessary corollary, that a contract for the sale of standing trees, with a right, at a future time, to enter upon the land to remove them, did concern an interest in land.”

Upon another point in the case, the learned Judge remarks (p. 167): “We apprehend that the execution of the deed by Ozias Story to Seneca E. Parks, containing the exception of the timber he had previously sold to the present plaintiff, cannot be tortured into any such *memorandum* of the contract between the plaintiff and Story, as the Statute of Frauds requires. It is not a paper executed by Story to the present plaintiff; and it contains no specification of the terms of the parol contract whatever, between Story and the plaintiff, and no allusion to them. To hold that the exception is a sufficient *memoran-*

dum would be in effect to repeal the Statute of Frauds. The *memorandum* must contain the substantial terms of the contract expressed with such certainty, that they may be understood from the contract itself, or some other writing to which it refers."

Vol I. p. 116. *Statute of Frauds.—Signing, etc.*

It has been seen that many questions have arisen as to the form, time, &c., of execution of a writing, and the party by whom it shall be executed, in order to comply with the requisitions of the statute. In the case of *Fessenden v. Mussey*, 11 Cush. 127, Thomas, J., gives the following opinion: "Assumpsit for the price of a pew in the Bulfinch Street Church, Boston, sold, as the plaintiff alleges, by her to the defendant. The defendant, among other grounds of defence, relied upon the Statute of Frauds. The pew was sold at auction, and in the record of sales kept by the auctioneer was this entry: 'Sale of pew in Bulfinch Street Church, for acc. Selinda Fessenden. Monday, March 24, 1845. Pew No. 18. Benj. Mussey, \$112.50. Charges, advertising, and commission, \$5.' If this memorandum was made at the time and place of sale, by the auctioneer, or his clerk, then acting under his direction, we think it is sufficient. *Gill v. Bicknell*, 2 Cush. 355; *Morton v. Dean*, 13 Met. 385. It designates clearly what was sold, by whom, to whom, the time when, and the price. The middle name of the purchaser is omitted, but it was competent to show by parol that defendant was intended, or that defendant was well known by the name, or that he subsequently recognized the signature. As to terms of payment, the presumption of law in the absence of an express stipulation is, that it was for cash, payable on a tender of a deed.

A newspaper advertisement offered land of the advertiser for sale at auction, upon the terms therein stated; one of which was, that one third of the price should be paid down. The sale took place, but no further writing was made, nor the money paid. Held, insufficient to pass an interest in the land, and that no action would lie for the price. *Kurtz v. Cummings*, 24 Penn. 35.

A widow joined with all but one of the heirs of her husband, in a

bond to sell their respective interests in her husband's real estate at public auction, she to receive for her life estate whatever might belong to her in accordance with the usual custom of calculating the value of life estates. On the 13th of May, a proposal to purchase was made at an auction, by the bid of a certain sum, but no written agreement was executed, nor was there any memorandum made by the auctioneer sufficient to bind the parties under the Statute of Frauds; and the other heir had not then agreed to sell. Four days afterwards, the widow committed suicide. On the 9th of June, all the heirs conveyed to the auction purchaser, dating the deed May 13th. The plaintiff, as administrator of the widow, brings this action for her share of the proceeds of sale against one of the heirs, who had received one portion of such proceeds for himself and another as guardian of a minor heir. Held, the action could not be maintained. Dewey, J., says (in substance): "She did not perform the act stipulated in the bond, as the consideration for her receiving her proper share of the proceeds of the sale. This claim cannot therefore be enforced by her administrator as a claim arising upon a specific performance of her contract. The only valid contract was that of the 9th of June. The *ante* dating of the deed, as of 13th May, had no legal operation to make it take effect on that day. The date written in a deed is of no effect. It is the time of the actual execution, that fixes the rights under it. On the 9th of June, a change of the interest of the heirs at law had occurred. Previous to the decease of Anna Carter, she held the land subject to her right of dower. After that event they held in themselves an unincumbered title. There was on 9th June no incumbrance of a widow's right of dower. During her lifetime no money was paid or tendered to her. Upon her death all her interest in the bond was gone. She had parted with nothing by any conveyance of hers, and no remaining interest of hers could have been conveyed by her administrator under any authority to carry into effect her contracts, inasmuch as her interest was personal, and terminated at her death." *Fletcher v. Carter*, 10 Cush. 81, 84.

Vol. I. p. 125. *License.*

Some late cases bear upon various points connected with the subject of *License*. The case of *Lakin v. Ames*, 10 Cush. 199, was an action of trespass for tearing down a horse shed, and one of the defences was, that the shed was so erected in front of a tomb, lawfully on a burying-ground, as to obstruct the entrance thereto, and that the defendant, having the legal right to open the tomb, and deposit a corpse therein, peaceably removed the shed for that purpose, doing no unnecessary damage. The facts of the case, and the judgment of the Court thereupon, sufficiently appear from the following remarks of Bigelow, J., (p. 219): "The vote by which Jonas S. Varnum and others had liberty to build two or more tombs in the graveyard, under the direction of the selectmen, and the erection of said tombs, in pursuance of such directions, operated as a valid grant by vote, to erect and use a tomb by said Varnum, with a right of access thereto, as the same was then constructed and subsequently used. *Damon v. Granby*, 2 Pick. 345, 351. It would be absurd and contrary to all rules of construction, to hold that this was a grant of a mere right to build a tomb, without the necessary right appurtenant thereto, of access to it over the common, and of entering it in the mode provided under the authority and direction of the agents of the town. There can be no doubt, therefore, of the right of the mother of the defendant, or of any person acting under a license or authority from her, to enter the tomb for the purpose of placing there the body of her deceased son, to remove all obstructions which would prevent or hinder the right of sepulture from being there performed in a decent and becoming manner. The learned counsel for the plaintiff have put this case mainly upon the want of authority on the part of the defendants to act in the mother's behalf. But the law will imply a license from the necessities of individuals and from the usages of the community. Thus it has been held that the entry upon another's close, or into his house, at usual and reasonable hours, and in a customary manner, for any of the common purposes of life, cannot be regarded as a trespass. It cannot be that it is necessary to produce formal proof of authority from a mother to a son to do all that was necessary and proper for the burial of her deceased son in the family tomb. The law will imply a license from the nature and exigencies

of the case, the relation of the parties, and the well-established usages of a civilized and Christian community."

It has been recently held in New York, that a parol license to divert water from a watercourse, so as to prevent it from passing over another's land, is valid. *Rathbone v. McConnell*, 20 Barb. 311. Strong, J., thus refers to the course of decisions upon this subject: "In *Pierrepont v. Barnard*, 2 Seld. 279, it was held, that a parol license by the owner of land to cut and carry away standing timber, fully executed before revocation, was a complete protection for what was done under it. The principle of that case is directly in point. The trees were as much a part of the freehold as the right to the use of the water. (*Green v. Armstrong*, 1 Denio, 550.) The diversion of the latter might be justified under a license, as well as the cutting of the former. *Liggins v. Inge*, (7 Bingham, 682; 20 Eng. Com. L. Rep. 287,) also goes directly in support of the validity of the license. It was an action on the case for wrongfully continuing the diversion of water from the plaintiff's mill, and the facts and question to be decided, as briefly stated in the opinion of Tindall, C. J., were these: 'It appeared in evidence before the arbitrator, that the bank of the river which had been cut down was the soil of the defendants; and that the same had been cut down and lowered, and the weir erected, and the water thereby diverted by them, the defendants, and at their expense, in the year 1822, under a parol license to them given for that purpose by the plaintiff's father, the then owner of the mill, and that in the year 1827, the plaintiff's father represented to the defendants that the lowering and cutting down the banks was injurious to him in the enjoyment of his mill, and had called upon them to restore the land to its former state and condition; with which requisition the defendants had refused to comply. The question therefore is, whether such non-compliance, and the keeping of the weir in the same state after, and notwithstanding the countermand of the license, is such a wrong done on the part of the defendants as to make them liable in this action. The operation and effect of the license, after it has been completely executed by the defendants is sufficient, without holding it to convey any interest in the water, to relieve them from the burden of restoring to its former state what has been done under the license, although such license is countermanded, and consequently they are not liable as wrongdoers for persisting in such refusal.' The views of the Court are given by

the Chief Justice at considerable length, and it is also held that the license, after it was executed, was not countermandable. That was much further than it is necessary to go in this case. That case is referred to with approbation in *Smith v. The Birmingham and Staffordshire Gas Light Co.* (1 Adol. & El. 526,) and in *Wood v. Manley*, (11 Adol. & Ell. 34.)

“The case of *Otis v. Hall*, (3 Johns. 450,) decides that such a license is valid, and also that setting it up does not raise a question of title. The action was a special action on the case, for overflowing the plaintiff’s land, by means of a mill-dam erected by the defendant on his own land. The defendant proved that he had permission to erect the dam, and overflow the plaintiff’s land if necessary for the use of the mill. On a motion by the plaintiff for full costs, on the ground that the title to lands came in question, the Court, after stating the question, and expressing the opinion that the freehold or title did not come in question, say: ‘The case bears no analogy to that of *Heaton v. Ferris*, (1 Johns. 146.) There was no claim of a right of entry into the plaintiff’s land, nor of any direct use or enjoyment of it. The defendant merely sets up a right to use his own land in the manner he has done, by erecting the dam; that any consequential injury to the plaintiff was waived by his express license for that purpose. The statute only applies to cases where a claim or question to the direct use by entry on another’s land comes in controversy. This and many other cases of consequential injuries, as for nuisances erected on the defendant’s own land, do not in any manner bring the title in question. Nor does the setting up a lease or license by the plaintiff raise a question as to the title, or give any right or interest in the plaintiff’s land.’ If a license to flow land with water is valid, it would seem that a license justifying the alleged wrongful diversion of water from it must be, at least, until revoked. The case of *Chandler v. Duane*, (10 Wend. 563,) was a motion for costs to the defendants, and similar to that last cited. Sutherland, J., says: ‘The action and the ground of defence, and all the circumstances in the case, were precisely the same as in this,’ and the same principle was applied. (See also *Clinton v. M’Kenzie*, 5 Strobhart, 36.)

“The case of *Powell v. Rust*, (8 Barb. 567,) is entirely unlike the present. The decision in that case, that a claim of title arose on the pleadings, was placed on the ground that Rust claimed, by virtue of an agreement with the plaintiff, the property in, and the right to enter

with teams and take away certain growing trees and shrubs, which were part of the land. Here, no transfer to the defendant of a right to the use of the water is asserted, but only a permission to do an act by which the diversion of the water was effected. If the license may not be revoked, it is not because it conferred any interest in the use of the water upon the defendant, but because it operated as a yielding up and relinquishment of the water diverted. (*Liggins v. Inge*, above cited.) *Mumford v. Whitney*, (15 Wend. 380,) is the case of a claim by the defendant to a permanent interest in the plaintiff's land. *Davis v. Townsend*, (10 Barb. 333,) contains only the same doctrine. For the foregoing reasons, I am of opinion that no claim of title to real property arises on the pleadings in this case."

Some cases have been cited, illustrating the respective rights of the parties to a license, in case of the construction of a dam, for the purpose of creating a water power. In a late case it has been held, that a parol license, that the plaintiff or his grantor may build a dam on the land of another, to raise a reservoir for the use of his mill, gives the plaintiff no right to *maintain* the dam, or control the water raised by it. *Pitman v. Poor*, 38 Maine, 237. Tenney, J., says, (p. 241): "The Court, in *Munford v. Whitney*, 15 Wend. 380, review many of the cases upon this subject, in which the doctrine of some is in conflict with that of others, and it is said by Savage, C. J., who delivered the opinion of the Court, 'I shall not undertake to reconcile these various cases. It is evident the subject has been understood very differently by different Judges. But in this all agree, that, according to the Statute of Frauds, any permanent interest in the land itself, cannot be transferred, except by writing. Much of the discrepancy may have arisen from the different ideas attached to the word *license*. If we understand it as Chancellor Kent defines it, it seems to me, there can be no difficulty.' 'If A. agrees with B. that B. may build a dam upon the land of A.—if it is to be permanent—such an agreement is not technically a license. The object of A. is to grant, and of B. to acquire an interest, which shall be permanent; a right not to occupy for a short time, but as long as there shall be employment for the water power to be created. Can such an interest, such a right, be thus created? The answer to this question is given in the language of Mr. Sugden, 'It appears to be in the very teeth of the statute.'"

Action for diverting upon land of the plaintiff the water of a canal,

located on his adjoining land, by means of a culvert built by the defendants, a railroad corporation, on the land last named. Held no defence, that the grantor of the plaintiff consented by parol to the building of the culvert and the consequent diversion of the water, verbally requested and assisted the defendants to build the culvert, and agreed to save them harmless from all damage. *Foot v. New Haven, &c.*, 23 Conn. 214. The decision proceeds upon the ground, that, if such license is in reality the grant of an easement or incorporeal hereditament, it is void under the Statute of Frauds; and, if a mere authority, was revocable by the plaintiff's grantor during his ownership, and, if it did not terminate by the transfer to the plaintiff, was revocable by the latter. It was further held, that the defendants could not set up a charter, empowering them, by taking certain steps, to acquire the right of so diverting the water of the canal; such steps not having been actually taken.

In *Jamieson v. Millemann*, 3 Duer, 255, it was held, that the main distinction between a grant and license to enter upon lands is, that the latter, whether made by parole or in writing, is, in all cases, revocable at pleasure. The single exception is, where the license is annexed as an incident to a valid grant, and its exercise necessary to a beneficial enjoyment of the grant. Also, that a parol license which, if held to be irrevocable, would operate as a transfer of an estate or interest in land, is wholly void, except as a justification for acts done under and prior to its revocation. And in such cases, a tender of amends to the party who has incurred expenses in acting under the license is not a condition precedent to a revocation; but such party is liable for all damages subsequent to the revocation. Duer, J., says (p. 259): "Here the permission to the defendant, to enter upon the lot of the plaintiff, was not given for a temporary purpose, but for that of erecting a permanent building, which he was to use and occupy during the residue of the plaintiff's term; and it is plain that, by holding that this permission could not be revoked, we should give to a mere and verbal authority the effect and operation of a valid grant, and would in effect decide that an interest in lands may be transferred by parole." The learned Judge proceeds to remark, that the only authorities for such a doctrine are certain cases in Pennsylvania, and the case of *Winter v. Broderick*, 8 E. 308; and that in the latter case the license did not transfer an interest in land, but merely suspended the enjoyment of an easement. The doctrine

of the case is, that where full effect may be given to a license by acts done on the lands of the licensee, although by these acts the enjoyment of an easement attached to the land of the licensor may be defeated, the usual objections to considering a license irrevocable do not apply, and consequently that, in such cases, if the license has been fully executed, it cannot be revoked. (*Moore v. Rawson*, 3 B. & C. 332; *Liggins v. Inge*, 7 Bing. 682.) But that this doctrine is wholly inapplicable when the acts which the license warrants are to be done by the licensee upon the lands of the licensor, and the effect of holding the license to be irrevocable, would be to give to the licensee a permanent interest or easement in these lands, has been determined in numerous cases in the English Courts, in those of our sister States, and emphatically in our own. (*Fentiman v. Smith*, 4 East, 109; *The King v. Inhabitants of Horndon*, 4 M. & Gil. 562; *Hewlins v. Shipman*, 5 B. & C. 221; *Wood v. Leadbitter*, 13 M. & W. 838; *Bryan v. Whistler*, 8 B. & C. 288; *Cocker v. Cooper*, 1 Cr. Mees. & R. 418; *Bird v. Higginson*, 4 Nev. & Man. 505; *Cook v. Stearns*, 11 Mass. 536; *Hayes v. Richardson*, 1 Gill & John. 366; *Price v. Case*, 10 Conn. 375; *ex parte Coburn*, 1 Cow. 568; *Mumford v. Whitney*, 15 Wend. 380; *Miller v. Auburn, &c.* 6 Hill, 61; *Houghtailing v. Houghtailing*, 5 Barb. 379; *Brown v. Woodworth*, Id. 551.) It is added, that the case of *Taylor v. Waters*, 7 Taunt. 374, holding a contrary doctrine, has been conclusively overruled; and the decisions in Pennsylvania proceed upon a doctrine peculiar to that State, where there is no Court having power to administer what is usually termed *equitable relief*. Upon the point of *making amends* before revocation, it is said: "I am not aware that the assertion rests upon any other authority than the *dictum* of Lord Ellenborough in *Winton v. Brockwell*, and this, we have the authority of the same learned Judge for saying, must be understood in a strict reference to the particular circumstances of the case in which it was uttered; that is, as applicable only where the license has been fully executed, and involves no more than the waiver or relinquishment of an easement or other privilege. In the case of *The King v. The Inhabitants, &c.*, it was held by the Court of King's Bench, that a license affecting the use or enjoyment of the realty, *although carried into execution*, is revocable at pleasure, though it deprive the licensee of the fruits of his money or labor; and this principle is distinctly affirmed in the subsequent cases of *Hewlins v. Shipman*, and *Wood*

v. Leadbitter. When a license is not simply gratuitous, but is founded on a valuable consideration, cases may, doubtless, arise, in which the licensee would have a just claim to be reimbursed for his expenses, and compensated for his labor; but even in such cases, if the license affects the use or enjoyment of the realty by the licensor, by creating an interest inconsistent with his own, I apprehend it has never been decided that the payment or a tender of full amends is a *condition precedent* to a revocation of the license."

Vol. I. p. 158. *Part-performance.*

The following case illustrates the question of *title* growing out of the contract of sale and purchase, and the effect of part-performance upon such title.

Action against a town under the Revised Statutes (of Massachusetts) c. 18, s. 7, for the destruction of a house to prevent the spread of a fire; brought by one who had no other title than a parol contract for a deed when he should have paid the purchase-money. The purchase-money not having been paid, held, the action did not lie, the plaintiff not being an *owner* within the terms of the act. Bigelow, J., says: "He then had neither a legal or equitable title to the premises. He had not such a right as would enable him to claim and enforce a conveyance from the owner of the legal estate. Assuming the ground taken by the plaintiff to be correct, upon which we express no opinion, that a full and clear equitable title would come within the provisions of the statute, so that a *cestui que trust* could be considered an owner, and entitled to claim compensation, it is clear that the plaintiff did not hold even such a title to the estate at the time of the fire." *Ruggles v. Nantucket*, 11 Cush. 433, 436.

In Pennsylvania, in the late case of *Poorman v. Kilgore*, 26 Penn. 365, it is held, that in parol sales of land, it is the duty of the Courts, in the application of the practice and principles of equity, to reject all the evidence of a verbal contract, if, being taken together, it fails to make out such a case as is entitled to stand as an exception to the statute. The use and possession of the real estate of a father by a child, is to be interpreted by the law of

evidence that arises from the family relation, and as between such persons, to receive a different construction from similar acts between strangers. As between such persons, the evidence of a gift or sale must be direct, positive, express, and unambiguous, and its terms must be clearly defined, and all the acts necessary to its validity must have special reference to it and nothing else. Thus the plaintiff agreed with his son-in-law, the defendant, that the latter should go into possession of a farm of the plaintiff, and give him one third of the grain raised thereon, and at the death of the plaintiff should have the farm. Under this agreement the defendant took possession and made permanent improvements. In this action of ejectment, held, the sale was within the statute, the law presuming that the plaintiff was putting into experimental operation for the benefit of his child, an arrangement which he expected to confirm at his death. Lowrie, J., says (p. 371): "A delivery of possession in pursuance of a verbal contract is now regarded as essential to the enforcement of it; but there is a plain reason why it ought not to be treated as securing that result, or as having as much force now as it once had. When livery of seizin was at common law a sufficient form of transferring title to land, it was an open and notorious act, performed in the presence of the neighbors, accompanied by the symbolical delivery of the turf or twig, and the declaration of the quantity of the estate granted. But even this solemn investiture was so open to frauds and perjuries that it called for the correction of the statute requiring the contract to be put into writing. Now, that common-law form has worn out, and delivery takes place without any form at all, almost always by a mere entry on a permission, express or implied; and thus the publicity and form of the delivery no longer avails as a check upon the mere invention of the sale."

The learned Judge further remarks: "In our first endeavor to administer these equitable exceptions through the instrumentality of a common-law trial, we very often failed by reason of our want of skill in applying such remedies in a form so unusual. This experience has forced upon the Courts a more careful study and application of equity practice, and a consequent rejection of all the evidence of a verbal contract, if, being taken as true, it does not make out such a case as is entitled to stand as an exception to the statute; 9 W. & Ser. 49; 9 Watts, 109; 1 Harris, 21; 7 Id. 461, 471. This improvement in the practice tends to the security of written titles,

even if the exceptions to the principle of the statute remain. In the case of *Brawdy v. Brawdy*, 7 Barr, 157, the Judge who tried the cause heard the evidence of the verbal contract, and then withdrew it all from the jury as being entirely insufficient to make out the case, and this practice was expressly approved.

“We may notice still another principle of law that is applied very beneficially to restrain the exceptions of the statute, and which is of especial importance in this case, though its application is not peculiar to cases under this statute. We allude to the law of evidence that grows out of the family relation. It is so usual and natural for children to work for their parents, even after they arrive at age, that the law implies no contract in such cases. And it is so natural for parents to help their children by giving them the use of a farm or house, and then to call it theirs, that no gift or sale of the property can be inferred from such circumstances. The very nature of the relation, therefore, requires the contracts between parents and children to be proved by a kind of evidence that is very different from that which may be sufficient between strangers. 2 Penn. Rep. 365; 8 Barr, 213; 9 Id. 262; 2 Harris, 201; 7 Id. 251-366; 1 Casey, 308; 2 Jones, 175. The importance of this rule is very apparent; for it requires but a glance over the cases of this class to discover how sad has been the experience of the Courts in family disputes, growing out of the exceptions which have been allowed to this statute; and how many and how distressing must have been the ruptures of the closest ties of kindred that have been produced and perpetuated by the encouragement thus given to try the experiment of extracting legal obligations out of acts of parental kindness. The delivery of possession is perfectly accounted for by the relation of the parties, and by the annual delivery of a share of the produce, as a tenancy from year to year, which is allowed by the statute. If a contract to farm land on the shares, and a delivery of possession under it, can be supplemented by another for an absolute grant, then certainly, as between parent and child, delivery of possession becomes a worthless protection against violations of the statute. Both the terms of this arrangement and the possession under it may readily be accounted for as founded on other intentions than that of a gift of the land, and therefore the law forbids us to infer that purpose. 3 Ser. & R. 546; 3 Penn. R. 365; 9 Watts, 42, 109; 7 Harris, 469; 1 Johns. Ch. 149. Some reliance is placed upon the improvements

made by the defendant, but, having been made without an actual gift, and only on the expectation or promise of a gift, they do not avert the rule of the statute. 1 Barr, 379 ; 3 Watts, 138, 255." See also *Cox v. Cox*, 26 Penn. 375.

In the late case of *Hunt v. Turner*, 9 Tex. 389, it is said, "a contract may be void under the Statute of Frauds ; yet, if the conduct of the party setting up the invalidity of the contract, has been such as to raise an equity outside of, and independent of the contract, and nothing else will be adequate satisfaction of such equity, it will sustain the sale, though not valid under the Statute of Frauds. *Dugan's Heirs v. Colwell's Heirs*, (8 Tex. R.) Again, a party to an illegal contract will not be permitted to avail himself of its illegality, until he restores to the other party all that has been received from him on such illegal contract. So long as he continues to hold or to enjoy the advantages of the contract, he shall not be allowed to set up to his advantage its nullity.

Robinson and his heirs were permitted to take possession of the land, and to make large improvements, and not a word said about enforcing the legal claim to the land by Hunt nor his heirs, until about nine years from the contract, and eight after the death of Hunt. Hunt went into possession of the land conveyed to him by Robinson immediately, and died upon it about a year after. His heirs continued to live on it as their own, until 1850, and then sold it, and in their deed to the purchaser, described it as the same land deeded to Hunt by Robinson in 1832. Will not these facts, under the principles laid down, raise an equity that will override the legal title to the plaintiffs to the land sued for? We have no hesitation in saying that it does."

In *Ottenhouse v. Burleson*, 11 Tex. 87, it was held, that where the purchase-money has been paid, and the purchaser has entered and made valuable improvements, specific performance of a verbal contract will be decreed in favor of the vendee ; and also that such a case falls within the operation of a statute giving jurisdiction to the Court to decree specific performance of the *written* contract of a decedent for the sale of land.



Vol. I. p. 174. *Construction of Contracts.—Parol Evidence.*

It has been recently decided in Massachusetts, that the time of performance of a written contract for the sale of real property may be enlarged by a new parol agreement. Fletcher, J., says: "As a general rule, in case of a simple contract in writing, oral evidence is admissible to show a subsequent oral agreement to enlarge the time of performance, or to vary any other terms of the contract, or to discharge it altogether. Whether or not this general principle is applicable at all, and if so, to what extent, to written contracts within the Statute of Frauds, is a question which has been frequently and largely discussed; and the adjudged cases upon the subject, both English and American, are numerous and very conflicting. In the case of *Cummings v. Arnold*, 3 Met. 486, this subject was very fully considered, and the cases examined by this Court. In that case the Court say: 'The principal design of the Statute of Frauds was, that parties should not have imposed on them burdensome contracts, which they never made, and be fixed with goods which they never contemplated to purchase. The statute, therefore, requires a memorandum of the bargain to be in writing, that it may be made certain; but it does not undertake to regulate the performance. It does not say that such a contract shall not be varied by a subsequent oral agreement for a substituted performance. This is left to be decided by the rules and principles of law, in relation to the admission of parol evidence to vary the terms of written contracts. We have no doubt, therefore, that accord and satisfaction, by a substituted performance, would be a good defence in this action.' The Court adopted the doctrine of the case of *Cuff v. Penn*, 1 M. & S. 21. That was an action of *assumpsit* against the defendant, for not accepting a quantity of bacon according to his written contract, which was within the Statute of Frauds. The defence to the action was, that the bacon was not delivered within the time specified in the written contract; to which the plaintiff replied, and proved that the time of delivery expressed in the written contract, was extended by the parties by a subsequent oral agreement, and that the plaintiff tendered the bacon to the defendant within the substituted time. The Court held that it was competent for the plaintiff to show that the parties, by a subsequent parol agreement, substituted a time for the delivery of the bacon different from

that mentioned in the written contract, and that he delivered or offered to deliver it, within the substituted time, and the plaintiff had a verdict and judgment. The present case strongly illustrates the propriety and necessity of the rule thus established. From the evidence in the case, it must be assumed that the plaintiff would have paid the money within the time limited in the written contract, if the defendant had not orally agreed to substitute another time, and the plaintiff, in fact, tendered the money within the substituted time. The defendant, therefore, by his own act, by orally agreeing to receive the payment at another substituted time, prevented the plaintiff from making the payment within the time limited in the original contract. Though the plaintiff was ready, and offered to make the payment within the substituted time, yet the defendant, notwithstanding his oral agreement, refused to receive the money, and now sets up the non-performance by the plaintiff within the time originally limited, which the defendant himself has by his own act occasioned, as a defence to the plaintiff's claim in this action. This defence cannot be maintained." *Stearns v. Hall*, 9 Cush. 31, 34.

In the case of *Hussey v. Roquemore*, 27 Ala. 287, the following remarks were made by the Court: "The evidence proved that this note, which was for \$300, was originally given for land bought by the defendant from the plaintiff; that the latter, discovering he did not own a portion of the land sold, agreed with the vendee, on receiving from him \$225 on the note, that he should be discharged from the payment of the balance, unless he executed to him a valid deed for such portion within a short time thereafter; that no such deed was executed for nearly two years, and that thereupon the defendant abandoned the land to which the agreement referred.

"If by the terms of the original contract, it had been provided that the defendant should not pay a certain amount of the purchase-money, until the vendor executed to him a valid title for the land in question, it would then fall directly within the principle of *Whitehurst v. Boyd*, 8 Ala. 375, and *Phillips v. Longstreth*, 14 Ala. 337. The general rule is, that verbal evidence is not admissible for the purpose of contradicting or altering a written instrument; but this rule does not exclude such evidence, when it is adduced to prove that such instrument is totally discharged. If the defendant had paid the whole of the purchase-money, and taken possession under the contract, a Court of Equity would have enforced it, by decreeing a con-

voyance ; if this could not have been done, on account of a want of title in the vendor, he would have been compelled to refund. This being the law, it would be singular if the parties could not, with the view of avoiding any future difficulty which might result from the failure of the vendor to obtain titles, extend the time of payment of the note, and provide that it should not be enforced if valid titles were not made within a certain time. We cannot doubt as to the validity of such an arrangement. So long as the vendee retained possession under the contract, it might operate on his part as a waiver, or extension of the time ; but he was not bound to wait always, since, by doing so, he was rendering himself liable to the actual owner, and might therefore abandon the possession in a reasonable time ; and if he did so, the note could not be enforced against him. The fact that the defendant retained the possession of the other lands, does not affect the principle, as the subsequent agreement had no relation to them. It was the same as if no other land had been purchased than the piece, the failure to make titles to which it was agreed should discharge the note. It seems to have been supposed that the agreement as to the discharge of the note was in the nature of a penalty ; and that, conceding its validity, the only benefit the defendant could obtain from it was, to scale the note to the amount of the actual value of the land to which titles were not made, and the fence which was upon it. But this position is not tenable. We doubt whether the doctrine can in any sense apply to an agreement of this character ; but, if it does, the plaintiff can derive no advantage from it, as the damages resulting from the failure to make a good title were uncertain. There was but a single act to be done ; and the disproportion between the value of the land to be conveyed and the amount due upon the note, if there was any, was so slight, that it could not authorize the Court to declare it a penalty. *Watts v. Sheppard*, 2 Ala. 425."

Vol. I. p. 180. *Time of Performing Contracts.*

We have already considered at some length the somewhat doubtful question, how far *time* is an essential part of the contract. In the late

case of *Porter v. Dougherty*, 25 Penn. 405, Lowrie, J., says (p. 406): "One who desires to enforce specific performance of a parol contract for the purchase of land must present his claim without unnecessary delay, and while affairs remain in such a condition that performance can be enforced without injury to others, and especially he must not himself have done any act that is incompatible with his claim for performance, or that makes such a claim inequitable. Here eleven years elapsed between the breach of the alleged contract by the plaintiff's grandfather, when he claimed and got back the land from the plaintiff's mother, and the bringing of this suit. In the mean time the grandfather made considerable improvements on the land, and then died; the devisee of this portion is in possession of it as part of her share of her father's estate, and must lose it if this claim succeeds; and the plaintiff's mother was bequeathed \$100, and it was paid to her. These circumstances very obviously set aside the equity on which the plaintiff relies, if it ever existed."

Contract of sale and purchase between the plaintiff and defendant; the latter to have occupation and possession, so long as he should fulfil the contract; but, in case of his default, the agreement to be void, and the plaintiff to have the right of immediate reëntry, and to be forever discharged from the agreement. It was further provided, that, on payment of \$745 in five years, with annual interest, the defendant should be entitled to a deed. On the day before the time of payment expired, the defendant tendered the amount and requested a deed. The plaintiff refused to receive the money and give the deed; upon the ground that he had not enjoyed the privileges in the house to which he was entitled, and saying that he would give no deed till he and the defendant had settled. They then agreed to leave the question of damages to A. and B., and the plaintiff to see B. and ascertain when he could attend to the business. An indorsement was then made upon the contract, not under seal, but signed by the plaintiff, extending the time of payment to the 25th of April. On or about that day, the money was again offered and a deed requested. The plaintiff refused as before, saying he had been unable to get B. to attend to it. The time was then extended by a similar indorsement to the 15th of May. A few days before that time, the defendant again tendered the money, if the plaintiff would give a deed, but he refused. Held, the defendant was entitled to the deed;

that he had been prevented from fulfilling the contract at the time appointed by the plaintiff himself, who could not take advantage of his own wrong by making this objection. Also, that parol evidence was admissible of the plaintiff's having agreed, at the time of the last tender and at other times, not to take advantage of the expiration of the contract, saying that a few days would make no difference; and that the money and a deed, ready for execution by him, were tendered on the 18th of May. *Stone v. Sprague*, 20 Barb. 509. The Court say (p. 515): "It has repeatedly been decided that the *time* of performing a written contract under seal may be enlarged by parol. In the case of *The Mayor, &c., of New York v. Butler*, (1 Barb. S. C. Rep. 325, 337,) the Court remarked that such an extension is in effect a *waiver* of a strict performance of the conditions of the contract; that no party can insist upon a condition precedent, when its non-performance has been caused by himself; that there may be an effectual waiver by parol of a condition specified in a written or even a sealed contract. 'It is a sound principle,' says Ch. J. Thompson, in *Fleming v. Gilbert*, (3 Johns. 528,) 'that he who prevents a thing being done, shall not avail himself of the non-performance he has occasioned.' The case of *Wiswall v. McGown*, (2 Barb. S. C. Rep. 270,) relied upon by the plaintiff's counsel, does not militate against this doctrine. The Court say, in that case, the Courts of Equity will interfere in favor of parties who were not ready to perform their agreements at the day, where a party has failed, through some unforeseen accident, *or where there is something indicating a waiver of the objection*, by the other party. But the case of *Esmond v. Van Benschoten*, (12 Barb. 366,) adjudicated in this district, settles this question beyond dispute, and decides that '*it is competent for parties on the expiration of a sealed contract, to enlarge the time for performance by parol.*'"

Bill for a specific performance of a contract between the plaintiffs and defendant, a corporation, for the sale of lands by the former to the latter, at a price to be fixed by third persons. The title to be perfect, and the defendants to pay within ten days after notice of the award. Within the ten days the vendors tendered a deed, and no objection was made to the title. Soon afterwards, another tender was made to the president of the company. He made no objection to the time or to any incumbrance on the property, but subsequently

returned the deed, the company retaining the property and doing nothing to abandon the sale. At the time of tender, there was a small mortgage upon the property of which the land sold was a part ; but it was paid within eighteen days after the award and before commencement of suit. Held, the defendants waived the right to have a perfect title within the ten days ; that the parties had not made time of the essence of the contract, nor was the making of a perfect title within ten days a condition precedent to payment of the price ; and that the plaintiffs were entitled to a decree, if they could make a good title at the time of such decree. *Viele v. The Troy, &c.*, 21 Barb. 381. The Court say (p. 390) : " It was as much the duty of the defendants to pay at the time stipulated, as of the plaintiffs to convey. Neither party could sue at law, without the tender of a deed by the one party, or of the purchase-money by the other. The provision for a conveyance of the premises free from incumbrances was not an express condition precedent, to be performed within the period of ten days after notice of the award, else the contract should be at an end, and the defendants relieved from payment. It was not the understanding of the parties that after the amount of the purchase-money had been ascertained, and notice thereof given, within ten days thereafter the plaintiffs should convey a perfect title, on making default, the agreement to be void. The defendants had taken possession of the premises prior to the award, and at the expiration of the ten days were using, and still continue to use them. There is nothing, therefore, in the contract, or the circumstances surrounding the case, showing that the parties had made time any part of the essence of the contract. The defendants could lose nothing by extending the time for the plaintiffs to convey a perfect title beyond the period of ten days, as they were in possession and use of the premises, and could not be called on to pay the award unless such perfect title were made. Within the ten days the defendants might have tendered the purchase-money and demanded a deed, and in default of the plaintiffs, have sued at law. So, also, the plaintiffs having tendered a deed conveying a perfect title, in default of payment might have maintained their action at law. As neither party has put the other in default, and the time is elapsed, it is probable that the remedy of both, at law, for a breach of the contract, is gone. Either party may, however, go into equity for a specific performance, and make the offer incumbent on him in the complaint ; and the failure to make the

tender before the commencement of the suit would only affect the question of costs (12 Vesey, 25). In general, and where lapse of time is not essential to the substance of the contract, it is not necessary for the plaintiff to show that he was able to give a good title at the time of making the agreement to sell, or even at the commencement of the suit. It will be sufficient if he can give a perfect title at the time of the decree, or at the time when the Master makes his report. (5 Paige, 241.) In *Seymour v. Delancey*, (3 Cowen, 445,) *Snydam*, Senator, said: 'In the case of a specific performance it is the usual course of the Court to refer the inquiry as to title to a Master. The Master is to inquire whether the party can make a deed according to his contract. If he can, it is sufficient, although he was not in a situation to do so when he entered into the contract, or at the time for performance; though it might be otherwise where one party had been quickened by the other, or where time is of the essence of the contract.'

A lease provided that the lessee or his wife might purchase the premises at any time within twelve months for a certain sum, and, upon payment thereof and all arrears of rent, that the lessor would execute a conveyance. The lease was dated January 1, 1849. The lessee occupied and paid rent during his life, and his widow paid rent for some time after. She subsequently notified the lessor that she was prepared to pay the money and desired a deed, but he refused to give one, on the ground that the proper time had gone by, and afterwards ejected her by a suit. She then brought the present action, after having on the 9th of October, 1852, tendered a deed for execution and the purchase-money. Held, that time was not of the essence of the contract. *D'Arras v. Keyser*, 26 Penn. 249. Woodward, J., says (p. 254): "Mere default in the payment of money at a stipulated time admits, in general, of compensation, and hence time of payment is seldom treated as of the essence of real contracts. Parties may make it so by express agreement, but there is nothing on the face of this contract, or in the attending circumstances, to indicate the intention of these parties to make time essential. The covenant for title was part and parcel of the lease, and the term fixed was one year, yet the lessees were permitted to hold over, and rent was received without objection. From this the law would imply a renewal of the lease from year to year, and put the landlord to his notice

when he meant to determine it. It is impossible to regard the year mentioned in the instrument as any more of the essence of the contract of sale than it was of the lease."

Acc. *Morgan v. Scott*, 26 Penn. 53—more especially where no precise time is fixed in the contract, where there was no delay which the plaintiff could avoid, and the defendant acquiesced in what there was, and partially caused it himself.

As to the *construction* of a contract in reference to time; where an agreement was made to make a title within "a short time," it was held not sufficient to tender a deed nearly two years afterwards, and after the vendee had abandoned the land. *Hussey v. Roquemore*, 27 Ala. 281.

Vol. I. p. 208; Vol. II. pp. 1-96. *Title.*

In reference to the obligation of a vendor to give a deed of the land before claiming the purchase-money, it has been held that a promise "to make a valid deed" is not fulfilled by offering the deed of a third person. *Hussey v. Roquemore*, 27 Ala. 281. It is said (p. 289): "The defendant was not bound to accept a deed from any other person than the plaintiff. If the title was in the party who made the tender, it might, it is true, have accomplished the object of the contract, which could only have been the transfer of a valid title; but it might have involved the trouble and expense of an inquiry to ascertain whether such title was good, and this inquiry the defendant was under no obligation to make."

In the case of *Siter's Appeal*, (26 Penn. 181,) the Court remark as follows, upon the effect of a party's *disabling* himself to fulfil the contract: "It is true, as a general principle in equity, that where the vendor of land is unable to comply strictly with his contract, and is therefore without the power to require the vendee to comply by proceedings for specific performance, equity will not lend her aid to the vendee in his effort to have a specific performance against the vendor; the remedy must be mutual. Where, however, the want of ability

to comply on the part of the vendee, and therefore want of mutuality in the remedy by specific performance, arises from *the default of the vendor*, he will not be allowed to take advantage of those circumstances; to permit him to do so would be to give him the benefit of his own wrong."

Contract to sell land for a projected railway. The vendor was described as having only a life estate in a portion of the land, and the projectors of the railway undertook to procure for him from Parliament the power to make a good title, but by their own default failed to do so, and the title thereby failed to be perfected. Held, they were liable to a bill for specific performance. *Eastern, &c. v. Hawkes*, 35 Eng. L. & Eq. 8. Lord Cranworth says: "Such powers were in fact obtained. The plaintiff repeatedly offered to do all that was requisite, in order to enable the company to profit by the use of these powers. If the appellants have wilfully let the opportunity pass, they cannot set up their neglect as a bar to the plaintiff's demand. They are estopped as between themselves and the plaintiff from disputing his title, and if after the death of the plaintiff any question should be raised by the remainder-man, that question must be then discussed and disposed of. It is the fault of the appellants that the title was not perfected, and they cannot take advantage of their own default."

A. agreed with a railroad company to convey to them a lot of land, being part of a tract owned by him; and the company agreed to erect a depot thereon; but, before a conveyance, the lot and all or most of the tract were sold on execution, and conveyed to B., who subsequently conveyed to the company, but they built no depot there. Held, the agreement became void by A.'s ceasing to own the land before performing it. *Sayre v. Harlem, &c.* 3 Duer, 54. Oakley, C. J., says: "He (the plaintiff) made the agreement as owner of the fee. It was only while he remained such owner that he was capable of executing it, and there is no pretence for saying, that during the continuance of his ownership, there was any breach of the agreement on the part of the defendants, that could entitle him to maintain an action. The defendants were certainly not bound to erect a depot until the lots upon which it was to be erected were, in fact, conveyed to them, and the evidence conclusively shows that no such conveyance

was received by them, until that made by Adriance, in 1849. Many years, however, before this time, Hall had ceased to be the owner. The conveyance by the sheriff to Adriance in April, 1842, extinguished his title, and by a necessary consequence, annulled the agreement between him and the defendants. The agreement between him and the defendants was just as effectually dissolved by the conveyance made by the sheriff to Adriance, as it would have been, had the conveyance been made by himself. The clause in the conveyance from Adriance to the company," (specifying that the land was to be used for a depot) "is not a covenant, but a mere declaration of the use or purpose to which the lots were meant to be applied. We cannot regard it as a revival of the agreement of 1840, or as a confession that this agreement was still subsisting; and were it possible for us to give it this construction, the unanswerable objections still remain that the agreement was not performed by Hall, and consequently that there was no consideration proceeding from him that could create an obligation to him on the part of the company, and that no damages which the law can notice were, or could have been sustained by him from the refusal or neglect of the company to perform."

It has been seen (p. 281) that a vendee is not bound to take his title from a third person. On the other hand, it is held, that a bill for specific performance does not lie, against one who contracted to convey to the plaintiff land of which he was not the owner; the plaintiff having knowledge of the fact, and it being expressly stipulated that the deed shall come from a third person. Nor will the Court retain the bill for the purpose of awarding damages. *Hill v. Fiske*, 38 Maine, 520. Appleton, J., says (p. 521): "There is no allegation, that at the time when this process was instituted, he (the defendant) had the title or the means of compelling its conveyance. It is not in proof that he has since acquired the means of doing either. Not having the title, no decree for a conveyance will be made against him. In *Hatch v. Cobb*, 4 Johns. Ch. 560, the Chancellor says: 'A specific performance cannot be decreed. The defendant has fairly disabled himself before the suit was brought, and this was known to the plaintiff.' In *Kempshall v. Stone*, 5 Johns. Ch. 193, the Chancellor says: 'That where the defendant has disabled himself before filing the bill, and that the plaintiff knew that fact before he commenced his bill, it is then reduced to the case of a bill filed

for the sole purpose of assessing damages for a breach of contract, which is a matter strictly of legal and not of equitable jurisdiction.' The same doctrine has been held to apply where the party contracting to convey never had any title to the premises contracted to be conveyed. *Morse v. Elmendorf*, 11 Paige, 279. It is obvious, where the party contracting has no title to the land agreed to be conveyed, that there is nothing upon which a decree for a specific performance can operate. *Woodark v. Bennet*, 1 Cow. 711." As to the claim of *compensation*, it is further remarked: "The cases of compensation in equity, I consider," says Lord Ch. Baron Alexander, in *Newham v. May*, 13 Price, 752, "to have grown out of the jurisdiction of Courts of Equity, as exercised in respect to contracts for the purchase of real property, when it is often ancillary as incidentally necessary to effectuate decrees of specific performance. It is well settled, that where the vendee never had title to the land contracted to be sold, or where he has conveyed the same subsequent to the making the contract, so that he has not the power specifically to perform the same, and that fact is known to the vendee, the latter cannot file a bill in equity for the mere purpose of obtaining compensation in damages."

Where the vendor conveys to a third person, the vendee may recover the amount of his payments and interest. *Hurd v. Denny*, 16 Ill. 492. Scates, C. J., says (p. 493): "The instruction refused, we think misconceived the nature of this action. It seems to be predicated upon the idea that the suit is in the nature of an action for a specific performance, and consequently, to entitle himself to a recovery, defendant must show performance of precedent conditions. But the suit is to recover back the consideration paid, on a breach of the contract by plaintiff by selling and conveying the land to another. Plaintiff has put it out of his power to perform, by sale to another. Yet the principle he contends for would lead to this injustice and hardship, that had there been two instalments due, as precedent conditions to a conveyance, and after the payment of the first he should sell the land to another, and so rescind the contract on his part, yet the other party could not treat it as rescinded, and sue for his payment back again, without first paying the second instalment, and thereby adding to the amount of his damage, injury, and the amount he would be entitled to recover. Were defendant relying for rescis-

sion upon the simple non-compliance of plaintiff, it might be necessary to establish his right to rescind, by showing performance, or an offer to perform." The Court proceed to allow interest, upon the ground, that, "when the money was paid, it was intended to be paid in good faith, on the land; but without apprising defendant of the fact, plaintiff resold the land, and concealed the fact from defendant's knowledge, until called on for a deed."

Bill for a sale of land to pay the purchase-money. Defence, *a cloud on the title*. By delay in bringing the cause to a hearing, partly through fault of the vendee; the lapse of time, and possession without disturbance or interruption, quieted the title. The defect being thus cured, a sale was decreed, but with costs to the purchaser. *Peers v. Barnett*, 12 Gratt. 410. Allen, J., says (p. 415): "A distinction seems to have been taken by some of the reported cases, as to the relief a Court of Equity will extend to a vendee who has accepted his deed with covenants of general warranty, where he seeks to enjoin a judgment for the collection of the purchase-money, and the case where the vendor, instead of proceeding against the vendee personally, is attempting to sell the land under a deed of trust or by a bill in equity; that although the facts may not authorize the Court to enjoin the collection of the purchase-money by a proceeding against the vendee at law, yet, as a Court of Equity reprobates a sale of land when clouds are hanging over the title, it will for the benefit of the parties, and the security of the purchaser at any sale of the subject, enjoin or refuse to decree a sale of the land until the title is cleared up. The case of *Beall v. Lively*, 8 Leigh, 658, is a case of the first class. It was there decided that where a vendee is in possession of land under a conveyance with general warranty, and the title has not been questioned by any suit prosecuted or threatened, such vendee has no claim to relief in equity against the payment of the purchase-money, unless he can show a defect of title respecting which the vendor was guilty of fraudulent concealment or misrepresentation, and which the vendee had at the time no means of discovering. In *Ralston v. Miller*, 3 Rand. 44; *Koger v. Lane*, 5 Leigh, 606; *Clark v. Hardgrove*, 7 Gratt. 399, this Court has extended the relief to cases where the vendee, placing himself in the position of the superior claimant, can show clearly that the title is defective. The principle that a Court will not sell or permit a sale of land with

a cloud hanging over the title, is affirmed in *Lane v. Tidhall*, Gilm. 130 ; *Gay v. Hancock*, 1 Rand. 72 ; *Miller v. Argyle*, 5 Leigh, 460."

In a late case in New Jersey, it was held, that a purchaser will not be compelled to take and pay the agreed price for an incumbered or doubtful title, unless he has expressly agreed to do so. *Chambers v. Tulane*, 1 Stockt. 146. Thus a devise was made as follows: "All and every part and parcel of my real and personal estate *hereinbefore not devised and bequeathed*, after my son arrives at the age of twenty-one years, in case his mother hath then departed this life, shall be sold at the discretion of my executors." Held, that land devised, but which by these terms had returned and become part of the estate, was not embraced in the power of sale. Also, that the power of sale was personal, and did not pass to an executor of the executor. Upon these grounds, held, a bill to enforce specific performance against a purchaser of the land should be dismissed; but without costs, the vendor having acted in good faith and by advice of counsel. The Court say (p. 153): "In decreeing a specific performance, the Court must exercise its discretion—not an arbitrary discretion—but a discretion regulated and governed by established principles. As a general principle, it is well settled that the Court will not compel a party to pay his money and take a doubtful title, or an incumbered property unless the party has bargained for such. There is no pretence that such was the case here. The complainant acted in good faith. He supposed he could give a good title to the land, and such was the understanding of both parties in entering into the agreement."

In case of an agreement to convey with a clear title, and that part of the price shall be paid for the release of a mortgage; if the vendor procures such release, the purchaser cannot refuse to perform his part, and demand a conveyance free from incumbrance. *Devling v. Little*, 26 Penn. 502.

The defendant bought certain mortgaged premises at a foreclosure sale, paying part of the price in cash and giving a note for the balance, and took from the mortgagee's attorneys a writing, by which he was "to have a title on the payment of said note." Held, the plaintiff could not bring an action on the note, until he had prepared and tendered to the defendant the proper papers for perfecting a title.

Culver v. Burgher, 21 Barb. 324. Marvin, J., says (p. 326): "The rule is well settled that the vendor of land cannot maintain an action for the price of the land, when the covenants or promises are mutual or dependent, until he has tendered performance on his part. If the consideration is to be paid by the vendee and the conveyance is to be made by the vendor at the same time, the vendor must tender and prepare the conveyance before he brings his action. When the deed is to be given *on* or *upon* the payment of the consideration, the acts of paying and conveying are concurrent acts. (*Hardin v. Kretsinger*, 17 Johns. 293; *Robb v. Montgomery*, 20 Id. 15; *Judson v. Wass*, 11 Id. 525; *Johnson v. Wygant*, 11 Wend. 48; *Williams v. Healey*, 3 Denio, 363.)"

Where there is a mutual obligation on the purchaser to pay the price, and the vendor to convey the land; an offer and readiness to perform on the part of the former are sufficient, especially if the vendor wholly refuses to convey. *Stone v. Sprague*, 29 Barb. 509. The Court remark (p. 514): "Before the time for payment expired, an interview was had with the plaintiff, during which the amount was tendered, in specie, and a deed requested. He replied that he would not receive any thing, nor give a deed. Here then was an absolute tender of the money, a refusal to receive, and to execute a conveyance. It is true no deed was offered by the defendant, at that time, ready for execution. But that was not necessary, and if it had been, the general rule that a strictly legal tender may be waived, by an absolute refusal to receive the money or do the act required clearly applies, on the principle that no man is bound to perform a nugatory act."

Agreement to execute a deed, on condition that the purchaser should pay the price by instalments. The vendor cannot wait till the last instalment falls due, and then sue for the whole amount, without tendering a deed. *Beecher v. Conradt*, 3 Kern. 108. Gardiner, C. J., says (p. 109): "The plaintiff had a right to sue for each instalment as they severally became payable; but this right he has waived, and now seeks to recover the whole purchase-money in this action, without an averment or proof of a tender of a conveyance, or a readiness or willingness to convey. It is not denied by the Court below, that if the several payments had been made as they fell due, and the suit had been commenced for the last instalment alone, that

the plaintiff must have made such an averment and sustained it by proof, if questioned. It is, however, said that a right of action accrued as the instalments became payable, which the non-performance of the plaintiff would not discharge. This doctrine assumes a right, upon the part of the plaintiff, to divide his cause of action into as many suits as there were instalments. The first answer to this suggestion is, that the consideration for the conveyance by the vendor was an entire sum, to be paid by instalments; that the whole was due at the commencement of the action, and the plaintiff has sued for the whole purchase-money without attempting to distinguish, in his complaint or evidence, between the different instalments. The second answer is, that the plaintiff having elected to wait until the fifth and last instalment became due, and upon the payment of which the defendant would be entitled to a deed, cannot now sustain his action for either instalment, without proof of performance or readiness to perform on his part. The covenants, as to the four first instalments, were originally independent; but the plaintiff, by his omission to insist upon a strict performance by the defendant, has lost the right to bring more than one suit for the money, which formed the consideration for his conveyance. The defendant, by a tender of the whole, which he has now a right to pay, would be entitled to his deed. The plaintiff, on the other hand, must establish his right to the consideration as an entirety, or he cannot recover any thing. If he recovered in this action but \$50, the judgment would be a complete bar to every further claim for the purchase-money, and when that judgment was paid the defendant would be entitled to his deed."

Bond to convey at a specified time, after payment of the last instalment of the price. Held, the vendee could not compel a conveyance till such payment, the title being retained as security for the whole purchase-money. *Delassus v. Boston*, 19 Mis. 420. The Court say (p. 429): "It would be absurd to suppose that the vendee could obtain a specific execution of the contract to convey, without paying the purchase-money. Reason and authority both forbid it. The agreement of the parties, as evidenced by the instruments they executed, was, that the vendors should, at least, be secure in the first instalment of the purchase-money, and for that purpose, they were to have personal security for its payment, and they were to rely upon

the land for the payment of the other instalments, if the vendee was otherwise unable to pay them, and to give effect to this agreement, the title was retained in the vendors. Where the vendors have title in themselves at the time of the agreement to sell, and, instead of making a conveyance, they make an obligation to convey at the time the last note for the purchase-money becomes due, it would require the clearest possible evidence of their intent to release the land from a lien for the purchase-money, to justify a Court in holding them bound to convey without being paid. No such intent appears in this case. In *Bassein v. Serra*, 14 Ves. 313, Sir Wm. Grant says: 'If a party selling an estate chooses to stipulate that the contract shall be completed, and the land conveyed, trusting for the payment of the purchase-money to the personal obligation of the purchaser, he cannot afterwards say, you shall not have the estate before you pay, because, under the contract, the right to a conveyance is not dependent on the payment of the purchase-money. But if the time had come when the covenant was to be performed, and the consideration was to be paid, the Court would not permit the party to receive that which he had purchased, without taking care that he paid the stipulated price for it.'" *Corsbie v. Free*, 1 Craig & Philips, 74.

It has been held in Pennsylvania, that a vendee once fairly in possession under articles of purchase, but illegally ousted, may recover in an action of ejectment, without bringing into Court the balance of the purchase-money due. *D'Arras v. Keyser*, 26 Penn. 249. Woodward, J., says (p. 252): "The plaintiff was suing for a possession which had been delivered to her in pursuance of a contract which she had fully performed. She had not indeed obtained the legal title, but equity considers that done which ought to be done, and when she tendered the purchase-money and interest, equity would have compelled Keyser to convey the legal title. Thenceforth she was no longer his tenant, but a purchaser in full possession, and, in contemplation of law, clothed with the legal title. The proceeding which wrested that possession from her, though under the forms of law, was null necessarily, because long before it was instituted the relation of landlord and tenant had ceased to exist. It was no better, as to its effect, than if the possession had been obtained from her by force or fraud. Whilst a vendee who has never had possession must come into Court prepared for full performance, a

vendee to whom possession had been delivered in pursuance of the contract, who has tendered full performance, and then lost the possession without assent or agreement, may recover it without bringing the money into Court. This is the doctrine of many cases. The facts are imperfectly stated in *Bossler v. Niesly*, 2 Ser. & R. 355, but the language of Chief Justice Tilghman clearly recognizes the principle I have stated. He says, it is objected that the plaintiffs ought to have tendered the balance of the purchase-money and interest before they commenced suit. But supposing the law to be so in general, this case forms an exception, because as it was submitted to the jury, we must understand that by the terms of the contract, possession was to be delivered before payment of the whole purchase-money, and was delivered accordingly; after which the plaintiffs were ousted. The plaintiffs then had the right of possession before payment of the purchase money, and, being ousted, had a right to recover the possession.

"*Harris v. Bell*, 10 Ser. & R. 39, is full to the point. Here the vendee died in possession under articles of agreement, the purchase-money not having been fully paid, and the administrator thinking the property was not worth what was due upon it, surrendered it to one Brieker, who the next day turned it over to the vendor. The only heir of the vendee brought this ejectment, and it was proved that prior to the institution of the suit, an offer was made to pay what was due upon the articles, which the defendant refused to receive, saying he would have taken it if it had been paid when it was due. The second point of defence taken was that *Harris*, the vendor, had a right to retain the possession till the money was paid to him or brought into Court, but this Court held, that, although he did not obtain the possession by force, yet he did so illegally; that under the circumstances of the case he was a trustee of *Mrs. Bell*, and could not resist her claim to restoration of the premises; that where the vendor puts the vendee in possession before payment of the money, and then forcibly regains the possession, or acquires it from the trustee of the vendee, *quà* tenant, he is bound to restore it. I am aware that some of the observations of Judge Duncan in this case have been qualified in subsequent cases. See *Griffith v. Dobson*, 3 Penn. Rep. 228, and Judge Rogers's remarks in *Foster v. M'Divitt*, 9 Watts, 345; but as an authority for the principle for which I have cited it, *Harris v. Bell* has never been shaken, but, on the contrary, was cited with approbation by Judge Kennedy, in *Gregg v. Patterson*,

9 Watts & Ser. 208, and by Judge Huston, in *Dixon v. Oliver*, 5 Watts, 372." The learned Judge proceeds to remark: "The parties are restored to their contract relation, and all of their mutual remedies remain. The vendor may enforce payment of the purchase-money by an action of covenant on the articles, or by ejectment; the vendee may compel conveyance of the title, by covenant or bill in equity for specific performance. If there has been a tender of the purchase-money as in this case, the vendor has only to execute the deed and take the money."

Action by vendor against vendee, to recover part of the purchase-money, retained by the latter to extinguish an outstanding lien, but which the plaintiff has subsequently paid, after an action brought against him. Held, the plaintiff need not prove his own liability upon the lien, because it would be extinguished and the defendant discharged, by payment made even by a stranger. *Evans v. See*, 23 Penn. 88. The Court say (p. 92): "Assuming, then, that the payment was made to the proper party, is it of any consequence in the present case that it was made *by* a party not compellable to make it? The question here is, whether the payment of the ground-rent did not release the fund pledged as indemnity against it? We think it did. The payment extinguished the ground-rent, and the lien of it was gone forever. The owner of it, being satisfied, could never assert it against premises sold by Evans to the defendants. If Waln had forgiven it, cancelled it without consideration, or if it had been paid off by a mere stranger, it could not longer encumber the premises or be set up against the plaintiff's action. But Evans was not a mere stranger or volunteer. If not strictly liable for the ground-rent, he had such an interest in its extinguishment as entitled him to pay it. He was sued for it, and its removal was indispensable to the closing of his contract of sale. Instead of resisting Waln's right to recover from him, he chose to remove the only obstacle in the way of his recovering the balance of his purchase-money from this defendant, and he had a right to do so. The payment was well made by him, and could not be disaffirmed or recovered back by him, nor impeached by others. From that moment, the money in the defendant's hands belonged, *ex æquo et bono*, to the plaintiff, and the action, as to the common counts, was brought in good time for its recovery."

Where one buys land with the funds of and in trust for another, taking the deed to himself; contracts to sell, but afterwards rescinds the sale without notice to the *cestui*; this is an abandonment of the trust, and assumpsit lies against him to recover the sum advanced for the purchase. *Duncan v. Lawrence*, 24 Penn. 154.

The defendant agreed in writing to sell and convey land to the plaintiff, who entered, paid part of the price, and afterwards demanded a deed and offered to pay the balance. The defendant was unable to make a good title, and the plaintiff brings this action, for money had and received, to recover the sum paid; but still retaining possession. Held, the action did not lie. *Hurst v. Means*, 2 Swan, 594. The Court say (p. 598): "The rule on this subject is stated in *Clarke v. Locke*, 11 Humph. R. 300. If the vendor on a proper demand made, refuse, or be unable to execute his contract, the vendee may bring his action thereon for the recovery of damages, thereby affirming the contract; or, at his election, may disaffirm the contract *ab initio*, and sue for money had and received to his use. The vendee has elected to disaffirm the contract. Do the facts amount to a disaffirmance and rescission of the contract? We are of opinion that they do not. It is a valid contract in writing, and was in part executed by the vendor; for he placed the vendee in possession under it. This possession has not been restored, but continued in the vendee at the time this suit was instituted. The vendee pretends to disaffirm and rescind the contract, and yet holds the possession, a benefit, under it. It is in this respect that the contract is not rescinded; and the action can only be maintained upon its absolute and total rescission. It would be unreasonable and unjust to permit a purchaser to retain the possession and use of the thing purchased, and yet to recover back the consideration as for a defect of title. The action for money had and received is, in its nature, equitable; and it cannot be maintained upon a principle so unequal and unjust. When a contract is properly rescinded, the parties are placed *in statu quo*. Where, however, the contract is void in itself, no act of rescission is necessary, in order to maintain the action for money had and received upon it. No right or duty can be predicated upon a void contract. It is the same as if it had not been made. Therefore, if a party enter upon land and pay money under a parol contract, for its purchase, he may recover it back, by action for money had and re-

ceived for his use, without restoring the possession or doing other acts to rescind the contract; for the contract never had a legal existence, and, of course, no action could be maintained upon it." *Walker v. Constable*, 1 B. & P. 306; *Beckerman v. Kuykendol*, 6 Blackf. R. 22; *Pipkin v. James*, 1 Humph. R. 325."

Action by the assignee of a writing obligatory. Plea, that it was made for the price of sundry tracts of land, which were conveyed to the defendant with covenants of seizin, for quiet enjoyment and against incumbrances, but were in fact incumbered, and that the consideration had therefore failed. On demurrer, held, the plea was bad. *Worthington v. Curd*, 15 Ark. 491.

With regard to the effect of a failure of title *in part*, it has been recently held, that a mortgage, given to secure a life annuity to one who has been dead forty years, is not an incumbrance for which a vendee may refuse to accept a conveyance. The Court say, "It was not fair in the defendant to catch at such an objection as this. It was in fact no incumbrance. Still, in order to silence him, the plaintiff procured satisfaction to be formally entered on the record." *Morgan v. Scott*, 26 Penn. 51, 53.

The defendant, desiring to purchase certain lots, owned in undivided parts, agreed with the plaintiff to pay him so much for each of the shares. The plaintiff purchased only part of the shares, which were conveyed directly to the defendant. Held, the defendant was liable for the amount which he agreed to pay for the shares purchased, although all agreed for were not purchased; and, having accepted the conveyances and taken possession, was estopped to deny that the title was good. *Robinson v. Snyder*, 25 Penn. 203.

Vol. I. p. 262. *Title to Leaseholds.*

An executory contract requires a conveyance in fee, if such be the manifest intention, though no words of inheritance are used. *Gaule*

v. Bilyeau, 25 Penn. 521. Thus a lease was made for seven years, with the right on the part of the tenant to take the property upon a certain ground-rent at any time within the first three years. The land was accordingly conveyed in fee within the time, and the tenant immediately conveyed to a third person, subject to the ground-rent. It was held, that by the lease the tenant took an equitable title in fee, although no words of inheritance were used in the lease, it being manifest from the instrument that a fee simple was intended; the parties having carried out that intention by the subsequent conveyance; and the tenant having made valuable improvements upon the premises.

Bill for specific performance of an agreement to take a sub-lease. The question was, whether the defendant was entitled to call for the production of the plaintiff's title, or whether, if he had had that right, he had not waived it by his conduct. Lord Cranworth says: "*Primâ facie*, every person contracting for a lease is entitled to call for the title of the lessor. There may be a technical difference between the case of the lessor being the owner of the fee simple and where he is but a lessee himself; in the one case the inquiry as to title is frequently dispensed with; in the other seldom. I should have thought the mere taking possession not important; but the question is, whether the conduct of the defendant was not inconsistent with calling for the title. It is to be observed that part of the contract was, that the fixtures were to be paid for by Sadd at a valuation, and he concurred in the nomination of the agent who was to make the valuation. Now, that was very unlike insisting upon his right to call for the inspection of the title, for the valuation was an expense which he would not have had to incur until he had become the lessee. On the 8th of December, he wishing to get rid of his contract, advertised for a purchaser of his interest, he having previously written, on the 25th of November, to the solicitors of the plaintiff, requesting them 'to defer the preparation of the leases, &c., as I have a prospect of finding a partner in that matter, who, I think, should be included therein.' I think that was very strong to show he had waived all right to call for the title." The Lord Chancellor proceeds to mention other circumstances, indicating a waiver of the party's right to object to the title, such as examining without objection a draft of the lease, &c., adding, "Upon the whole, I consider the

result irresistible that the defendant never meant to ask for the production of the title, but, as a matter of form, I think the language of the decree is wrong in saying that the defendant had accepted the title. I think also, with Alexander, C. B., in *Warren v. Richardson*, 1 Younge, 1, that this is a matter not of form merely, but of substance; for suppose that the plaintiff could not execute proper leases? I think, therefore, that the language should be, as in *Warren v. Richardson*, that the defendant had waived his right to call for the title of the plaintiff." *Simpson v. Sadd*, 31 Eng. L. & Eq. 385.

Vol. I. p. 303. *Mistake.*

In reference to the effect of a *mistake in law*, it has been recently held in Arkansas, that a vendor is bound by his contract, notwithstanding a mistake on the part of both parties to the contract as to his legal power to transfer the interest of his wife in the land. *McDaniel v. Grace*, 15 Ark. 465. The Court say (p. 488): "The plea alleges that Hooper contracted to make to defendants a valid conveyance, and failed to do so. Does it excuse him for failing to comply with his contract, that the defendants, as well as himself, perhaps, were mistaken in reference to his legal power to act for his wife, and on account of such mistake, accepted an invalid deed? Hooper was as much bound to know the law as the defendants. If he knew in fact that he had no legal power to act for his wife, he perpetrated a fraud on the defendants in attempting to convey for her. If he did not know that he had not legal authority to act for her, he simply labored under a mistake of the law. The defendants had no motive to cheat themselves, by accepting an invalid conveyance; and must, therefore, have acted under a mistake. The mistake, then, to put it on the fairest ground for Hooper, was mutual, and can hardly furnish an excuse for his failure to comply with his contract." See *The State v. Paup et al.*, 13 Ark. Rep. 129.

Bill for specific performance. The defendant, a mortgagee with power of sale, having obtained a foreclosure decree, agreed to sell

the estate, with a proviso for the usual covenant against incumbrance created by herself. The plaintiff, the purchaser, objected to the validity of the decree, and required a conveyance under the power, which being refused, this suit was brought. The defendant proved that the above clause was inserted inadvertently, and that she never designed to incur the risk of opening the foreclosure by conveying under the power. Held, a good defence; and that the bill should be dismissed, unless the plaintiff would accept the conveyance which the defendant was ready to execute. *Watson v. Marston*, 31 Eng. L. & Eq. 167. The following remarks of the Court (p. 172) illustrate the prevailing rule for enforcing or refusing specific performance in cases of this nature: "Relief by way of specific performance is always within the discretion of the Court. This discretion is of course to be exercised carefully. Specific performance is not to be withheld merely upon a vague idea as to the true effect of the contract not having been known. But, upon the evidence in this case, I think that, although there may have been an intention to complete after the mortgage title, there was no impression on Mr. Fisher's part that the effect would be to convert the defendant into a trustee of the surplus for the mortgagors. He may have intended that the purchase should be completed under the power; but it clearly was not his intention to deprive the defendant of the benefit of the foreclosure. The rules upon which the Court acts will appear from two or three cases. In *Costigan v. Hastler*, 2 Sch. & Lef. 166, Lord Redesdale said: 'When a person undertakes to do a thing which he can himself do, or has the means of making others do, the Court compels him to do it, or procure it to be done, unless the circumstances of the case make it highly unreasonable to do so. Hastler had a contract with Parker, which he could have carried into execution, provided he could either have got the consent of the mortgagee to the lease, contracted for by Parker, or the claim of the mortgagee could have been satisfied by payment of a mortgage debt. If a mortgagor contracts to make a lease, the tenant has a right to say: "You shall either obtain the consent of the mortgagee or redeem the mortgage; or if you complain of the hardship of this, you shall rescind the contract." A Court of Equity may not compel the mortgagor, if highly inconvenient, to pay off the mortgage for the purpose of giving effect to the contract; but then he shall not enforce it against the tenant, if the tenant does not wish to abide by it. If the tenant will not give up the contract, the

Court might say that it should not be specifically enforced against the landlord under such circumstances, and leave the tenant to seek his compensation in damages at law.' *Wedgewood v. Adams*, 6 Beav. 605, was as strong a case as could be. There Lord Langdale said: 'I conceive the doctrine of the Court to be this, that the Court exercises a discretion, in cases of specific performance, and directs a specific performance unless it should be what is called highly unreasonable to do so. What is more or less reasonable is not a thing that you can define; it must depend on the circumstances of each particular case. The Court, therefore, must always have regard to the circumstances of each case and see whether it is reasonable that it should, by its extraordinary jurisdiction, interfere and order a specific performance, knowing at the time that if it abstains from so doing, a measure of damages may be found and awarded in another Court. Though you cannot define what may be considered unreasonable, by way of general rule, you may very well, in a particular case, come to a balance of inconvenience, and determine the propriety of leaving the plaintiff to his legal remedy by recovery of damages. If we acceded to the respondent's argument, we should, I think, be deviating from the principles on which the Court has acted in these cases. The Court does not refuse a specific performance on the arbitrary discretion of the Judge. It must be satisfied that the agreement would not have been entered into if its true effect had been understood."

It is no ground for rescinding a sale, that lands have by mistake been included in the deed, to which the vendor has no title, but which did not make part of the property purchased. *Butler v. Miller*, 15 B. Mon. 617. The Court say (p. 626): "Miller does, however, allege in general terms that the plaintiffs had no valid title to the lands sold him, and that to a portion of it they had no valid or colorable title whatever. It appears in testimony that the title is in some respects defective; although Fitch and those under whom he claimed had been in the possession of it for many years, claiming it as their own, and the defendant has been in the undisturbed possession of the whole of the property actually purchased by him, ever since he obtained the possession of it under his contract. The charge of fraud against the vendors is wholly unsupported. They deny having made any representations to the purchaser about the title, or to have

stated to him that the title was good, although they admit they may have said that in their opinion it was good. It does not appear that they said or did any thing to induce the purchaser to believe they had any knowledge of the goodness of the title. The very terms upon which they proposed to sell should have put him on his guard, and induced him to investigate the title for himself. They only agreed to convey the title which had been vested in them without any covenant of warranty, and without any responsibility upon themselves whatever. He purchased from them upon these terms, and after having had time to examine the title he accepted a deed from them in fulfilment of the contract upon their part. The fact that the deed does not contain a covenant of warranty, cannot operate in his favor. It proves that he did not only rely upon his vendors, but was willing to purchase the property and risk the title. Purchasers have a right to make such risking contracts, and when made can only be relieved from them upon the ground of fraud in their procurement."

Ejectment. The plaintiff agreed to convey all his right, &c., in tract No. 3133, when in fact the tract was No. 4821. The purchasers had examined the land before the sale, and they entered and made improvements, but did not pay the price. Held, the misdescription was no defence to this action. *Miles v. Williamson*, 24 Penn. 135. Black, C. J., says (p. 142): "The vendees saw the land, examined the lines on the ground, investigated the vendor's title and took it at their own risk. They got possession of the very land which they meant to buy, and which the other party intended to sell them. The defendants insist that this error entitles them to keep the land without paying the purchase-money. They will neither rescind the contract nor perform it, and this action is brought to compel one or the other. The jury were instructed that although the vendees agreed to run the risk of the title, yet if the vendor was guilty of any fraudulent misrepresentation the contract was void, and he could not recover; and that, if the contract was made under a mutual mistake injurious to the vendees, there should be a deduction from the purchase-money large enough to compensate for the loss. It is impossible to see how any thing better for the defendants could have been done. The jury negatived the allegation of fraud, and, by allowing nothing to the defendants for the mistake in the number, they declared their conviction that it did no injury. The vendees got

possession of the land they bought with perhaps a defective title; but the verdict is conclusive upon us that the title would have been no better than it is if the land had been found to lie within the limits of the survey which was supposed to embrace it. The defendants complain of it as a hardship that they should be compelled to surrender possession after making improvements. They took the title at their own risk, and of course improved the land on the same terms. A vendee cannot improve away the vendor's right to the purchase-money. One who has bought land with his eyes open, and without a warranty, is as much bound to pay for it after he puts up a building on it as he was before. These defendants are not asked to surrender the land, and lose their improvements. They may keep both if they will perform their covenant."

A vendee cannot avoid specific performance, or claim compensation, upon the ground that after the sale the land was laid out into streets in a way not anticipated by the parties, and injuriously affecting the shapes of the lots; there being no warranty or misrepresentation by the vendor. *Morgan v. Scott*, 26 Penn. 51.

Vol. I. p. 324. *Fraud.*

A purchaser of land containing a mine, of which he has knowledge, is not bound to inform the vendor, who is ignorant of it. *Harris v. Tyson*, 24 Penn. 347. Black, J., says (p. 359): "A purchaser is not bound by our laws to make the man he buys from as wise as himself. Every man must bear the loss of a bad bargain legally and honestly made. If not, he could not enjoy in safety the fruits of a good one. If the defendant, during the negotiation for the purchase, wilfully made any misstatement concerning a material fact, and then misled the plaintiff and induced him to sell it at a lower price than he otherwise would, then the contract was a cheat and the deed is void utterly. But in all cases where the evidence brings the parties face to face, the language and conduct of the defendant seems to have been unexceptionable. An offer was made and rejected to prove that Tyson had made certain statements in the neighborhood which were

calculated to produce the impression that all the chrome in that region was not very valuable. It was even proposed to be shown that he had spoken in depreciating terms of said chrome on a tract adjoining Harris's. It would at least have been useless, and it might have had a pernicious influence on the minds of the jury, to have admitted such evidence. To invalidate a solemn deed by showing that misrepresentations were used to obtain it, there must be very clear proof that the falsehood was told directly or indirectly to the grantor. It is not to be supposed that he was influenced by a statement neither made to himself nor communicated to him. If the vendee's conduct in all his transactions with the vendor was honest and fair, he is not answerable in this action for what he may have said elsewhere to other persons."

Upon a bill in equity by a vendee to rescind the sale for fraud, and recover the purchase-money; the plaintiff must show a surrender of the property, or an offer to surrender it, and that the vendor can be placed in *statu quo*. It is not sufficient to allege, that he abandoned and yielded the possession of the land. *Davis v. Tarwater*, 15 Ark. 286. The Court say (p. 290): "The rule is the same, whether the rescission is sought on the ground of fraud, mistake, or for any other cause. *McDonald v. Fithian*, 2 Gilman, 269; 13 Ark. 182; *Cunningham v. Fithian*, 2 Gilman, 651; *Griffith v. Depew*, 3 A. K. Mar. 180. This doctrine conforms to the civil law; and the application of a vendee to a Court of Equity to rescind a contract of sale, closely resembles the rescissory action of the civil law on the part of the buyer. The object of this action is to rescind the contract of sale, and it cannot be commenced, but by virtue of letters of rescission obtained in Chancery, by which a rescission is directed, if the injury set forth by the buyer shall appear to the Judge. The seller must render to the buyer the price which he has received, upon condition that the latter render him the estate sold; which must be restored in the condition in which it was found; with all the augmentations subject to the contract, whether natural or alluvial, or artificial, as buildings erected upon the land. The seller, however, must make allowance for necessary repairs and erections, and the buyer is liable for rents and profits. *Pothier on Contracts of Sale*, Part 5, c. 2, §§ 374, 381, 382. The duty and obligation of vendor and vendee, do not differ essentially, under our system and under the civil law, be-

cause under both the vendee may obtain the purchase-money with interest, and must restore the estate. And while he is accountable for rents and profits, he may be reimbursed for necessary repairs and erections, and also for taxes and assessments. *Reynolds v. Nelson*, 6 Mad. 19; *Hunter v. Geridy*, 1 Ham. 449. In *Murphy v. Officer*, 8 Yerg. 502, it was held that, on rescinding the contract, the purchaser was bound to give up the land; and until he did so, an adverse title in himself, procured after the decree of rescission, could not be set up by him. And in *Fitzpatrick v. Featherstone*, 3 Ala. 40, it was expressly held, that a contract for the sale of land could not be rescinded, where the purchaser did not offer to return the land to the vendor. It may therefore be asserted, as a rule well sustained by reason and authority, that if the vendee has gone into the possession of the estate, and wished to rescind the contract, he must give fair notice of his intention to do so, and must surrender, or offer to surrender the estate to the vendor, or, in case of death, to him on whom the descent is cast. He has no right to abandon it to the mercy of the public without notice, because the inevitable consequence would be waste and dilapidation, even if it should escape a sale for taxes, and thus pass beyond the reach of vendor and vendee forever. And it is for the person asking for the exercise of this highest power of a Court of Equity to show clearly, that he can restore the land on rescission, and that the parties can be placed *in statu quo*, and it is not for the opposite party to show that it cannot be done. 1 S. & M. 146."

It has been held in a late case, that a vendee cannot rescind the sale for fraud, after taking possession, and after the expiration of ten years from the time of sale, and five years from discovery of the fraud. *Davis v. Tarwater*, 15 Ark. 286.

Vol. I. p. 428. *Specific Performance.*

With regard to the claim for specific performance, as depending upon the want of *an adequate remedy at law*; it has been held in a late English case, that the projectors of a proposed railroad are liable

to a bill for specific performance of a contract to purchase land, although an action at law might also be maintained against them. *Eastern, &c. v. Hawkes*, 35 Eng. L. & Eq. 8. In the course of his opinion, Lord Cranworth refers particularly to two previous cases, where a contrary doctrine was said to have been held by the Court; *Webb v. The Direct London, &c.* 1 De G. Mac. & G. 521; and *Stuart v. The London, &c.* Ib. 721. "In the former of these cases the Court proceeded on two grounds. In the first place, the terms in which the deed was framed were such as to lead the Court strongly to the conclusion that the whole contract was meant to be conditional on the line being formed, and that if it should be (as in fact it was) abandoned by its projectors, then all the provisions of the agreement were to fall to the ground; a construction, I may observe, which receives great support from the subsequent case of *Gage v. The Newmarket, &c.* 18 Q. B. Rep. 457. But independently of that difficulty, the case appeared to be one in which a Court of Equity ought not to interfere in favor of the plaintiff, for that, by any such interference, we should be doing injustice in the attempt to add to the legal remedy. The injury which the plaintiff sustained by the non-performance of the contract was this: though he was left with the whole of his land untouched, he lost all claim to the £4,500, and might, perhaps, have sustained damage consequent on his having been for five years liable to have any portion of it, not exceeding eight acres, taken by the company for the purpose of the railway. That was evidently a case for compensation by action for damages, and not for relief by way of specific performance. Indeed, I hardly know how a decree for specific performance could have been there enforced, for no particular eight acres had been contracted for, and the company had no power to select eight acres, except for the purpose of making the railway, the power to make which had long since ceased. On these grounds the Court refused to interfere, leaving the plaintiff to the legal remedy on his covenant.

The circumstances of Lord James Stuart's case were similar in principle. The only or principal difference between this latter case and that previously decided was, that in Lord James Stuart's case there was no contract by the company under seal, but in the course of the argument the directors offered to remove all difficulty on that head, by admitting, in any action which the plaintiff might bring against them, that they had by deed, under seal, covenanted to per-

form any contracts entered into by the agent of the projectors before the passing of the act. To permit the plaintiff to remain passive till the directors could not have any use for the land, and the power to make the line had expired, and then to compel them to select and purchase the land, would be to make the extraordinary interposition of the Court ancillary to injustice instead of justice.

“Here there is no uncertainty as to the subject-matter of the purchase. The vendor did not sleep on his rights, and wait until it was impossible for the purchaser to make the line. On the contrary, from the very day on which the contract was to be completed he insisted on its performance, having shortly before that time quitted possession of the property, and within less than five months afterwards he filed his bill. It is true that the directors, after the filing of the bill, allowed the time to pass within which they were bound to complete their line. But the plaintiff is not to blame for that. He did not, either actively or passively, mislead the defendants, and it would be impossible to hold that he is not entitled to the relief that he asks, without going the length of saying that no vendor of an estate, contracting to sell to a railway company, can ever have a decree for a specific performance if the company should see fit afterwards to abandon the undertaking, with a view to which the contract was made.”

Lord Brougham remarked (p. 22): “If these cases (above referred to) were applicable to such a state of facts as those which exist in the present, I should dissent from them, and consider that they do not give the law of the Court upon the subject of specific performance. But I am of opinion that they do not apply to the facts of this case.”

Lord Campbell says (p. 25): “Where there is a valid executory agreement for the sale and purchase of land, there can be no doubt that the vendor as well as the purchaser is *primâ facie* entitled to resort to a Court of Equity for the purpose of having the contract specifically performed. Generally speaking, pecuniary damages adequate to the pecuniary loss sustained from the breach of the contract would be an indemnity to the vendor; but still, damages would not place him in the same situation as if the contract had been performed, for in that case he would entirely have got rid of his land, and he would have in his pocket the net sum for which he had agreed to sell it; whereas if he is driven to his action at law, he retains the land,

and he can only recover the difference between the stipulated price and the price which it would probably fetch if resold, together with incidental expenses, and any special damage which he had suffered. In every case justice requires that the purchaser should be entitled to specific performance, for as to him no amount of damage would necessarily be an adequate compensation; and there must be reciprocity of remedy between vendor and purchaser. Indeed, the remedy must necessarily be afforded to the vendor as well as purchaser, from the well-known doctrine of conversion upon the signing of a valid contract for the sale of land, the equitable estate then vesting in the purchaser, and the vendor then holding the legal estate only as his trustee. This being so, the *onus* lies upon the appellants to show that the respondent was not entitled to a decree for specific performance. Here the objection of delay, which has sometimes very properly prevailed, cannot be taken, and it cannot be contended that the vendor has lost his right to the remedy he seeks by doing any thing which he ought not to have done, or by omitting to do any thing which he ought to have done subsequently to the date of the agreement, with good faith and punctuality. He has performed his part of the agreement; he has always been ready and willing to complete the purchase, and he has urgently and earnestly pressed the company to complete it."

* Upon a bill for specific performance, *inadequacy of consideration* is no defence, unless so great as to raise a conclusive presumption of fraud. *Viele v. Troy, &c.* 21 Barb. 381. It is said by the Court (p. 389): "When an agreement in relation to real estate is in its nature and circumstances unobjectionable, and the contract is in writing, is certain and fair in all its parts, is for an adequate consideration, and capable of being performed, it is as much a matter of course for a Court of Equity to decree a specific performance, as for a Court of Law to give damages for a breach of it. Indeed, the cases are numerous where equity has enforced contracts for the breach of which no action for damages could be maintained at law. The case of *Seymour v. Delancy*, 3 Cowen, 445, is in point. In that case the vendor's remedy at law was gone, by reason of there being a mortgage on the estate, so that he could not convey a good title at the day fixed upon by the contract, yet a bill for specific performance was sustained. In equity, the leading inquiry is, whether *in conscience*

the contract should be enforced ; and mere technical objections that would defeat an action at law for damages are not allowed to produce inequitable and oppressive results."

In the same case it is further remarked (p. 394) : "Whether a Court of Equity shall decree the specific performance of an agreement, or not, is a matter resting in its discretion ; but this is a sound legal discretion. It will not lend its aid to enforce an unconscientious contract. The case presented must be fair, just, and reasonable ; the contract free from fraud, misrepresentation or surprise ; and not hard, unconscionable, or unequal. It must also be entered into upon adequate consideration ; and where the inadequacy of price in a contract to sell, is so great as to be conclusive evidence of fraud, as where it would shock the moral sense of an indifferent man, a Court of Equity should not carry it into effect. But inadequacy of price merely, without being such as to prove fraud conclusively, the contract being entered into deliberately and fair in all its parts, is not an objection to its being executed. The consideration to be paid for the land was not definitely fixed in the contract, but the sum submitted to men indifferently chosen by the parties. A majority of those men fixed the price to be paid for the land, and that sum is to be regarded and treated as the consideration, as though it were named in the agreement. It seems a disproportionate compensation. But is there enough in the case to show that the price was so inadequate as to shock the moral sense, and be conclusive evidence of fraud ? We may surmise from the disproportion between the value of the whole farm, and the price fixed as the consideration for the small part in acres taken for the purposes of the road, that the defendants were made to pay pretty dearly, but the price does not shock the moral sense, as it may be that that part of the farm taken was worth the sum of the appraisal."

The following decision relates to the claim of specific performance *in a doubtful case*, (Vol. I. p. 434.) Receipts of the Comptroller General for part of the purchase-money were offered as evidence of the sale of lands by the State. On the other hand, the sheriff's certificate and return of sale were not produced nor accounted for ; one witness testified, that to his recollection the alleged purchaser was not present at the sale ; and the answer alleged that the vendee in his life denied his ownership. Held, the balance of evidence was such

as to justify the Court in refusing specific performance. *Everett v. Towns*, 17 Geo. 15.

In addition to this main ground of the decision, Benning, J., remarks (p. 29): "Taking the bill to be true, the complainants need no help from equity. Their *legal* title, they say, is complete. They say the legal title vested in Everett, at the time when he paid the purchase-money to the State. If so, what use is there for this bill? None.

"And I may say for myself, that I know of nothing that gives to a Court of Equity the *power* to grant the prayer of this bill. Whence did a Court of Equity get the power to nullify an act of one of the departments of government. If it can nullify a grant made by the Executive Department, why may it not equally nullify a commission issued by that department—a military order made by that department—in a word, any act of that department? If it can do things of this sort, it must be by virtue of some grant of power to it in the Constitution, or in the law. I know of no such grant. Such a power English Courts of Equity do not pretend to have."

Conformably to the prevailing rule, (see Vol. I. p. 435, Vol. II. p. 189,) it has been recently held in New Jersey, that specific performance will not be decreed, where there is *a want of mutuality*. *Stoutenburgh v. Tompkins*, 1 Stockt. 332.

Upon this ground, the assignee of a bankrupt, or one claiming under him, cannot maintain a bill for specific performance, unless he affirm the contract and make it mutual in reasonable time. *Ib.*

The Chancellor (p. 342) gives the following view of the decisions upon this subject: "A want of mutuality is an objection to a decree for specific performance in this case. Let us see how far the Court has carried this objection. In the case of *Hatton v. Gray*, 2 Cha. Ca. 164, Hatton sold houses to Gray for two thousand pounds. The note of the agreement was signed by Gray only. The solicitor said in argument: 'The note binds not him who signed it not, for the Statute of Frauds and Perjuries, &c., and therefore in equity cannot bind the other party, for both must be bound or neither of them, in equity.' But it was decreed contrary. *Armingar v. Clarke*, Bunbury's Rep. 110. The bill was dismissed *per totam curiam*, chiefly upon the principle, that the remedy was not mutual. In *Owen v. Davies*, 1 Ves. 82, the bill was for the specific performance

of an agreement with one since become a lunatic, for the sale of a reversion upon an estate for life. It is apparent from the report of the case, that the defence insisted on was, that the remedy was not mutual, because the rights of the parties were altered on account of this change in the condition of one of the parties. The Lord Chancellor did not deny the principle contended for. He said: 'It is certain, that the change of the condition of a person entering into an agreement, by becoming lunatic, will not alter the rights of the parties, which will be the same as before, provided they can come at the remedy. As if the legal estate is vested in trustees, a Court of Equity ought to decree a performance; and the act of God should not change the rights of the parties; but if the legal estate be vested in the lunatic himself, that may prevent the remedy in equity, and leave it at law.' In 1 Atk. 2, (*Stapilton v. Stapilton*), the general rule was admitted. The mutuality was destroyed by the act of God. The agreement was such that both parties run this same risk. The Lord Chancellor said: 'The chance was equal, who died first, Henry or Philip.' In 1 Schoales & Lafroy, 18, (*Lawrenson v. Butler*), Lord Chancellor Redesdale is for adhering to the rule, as to mutuality, most rigidly. He remarks in that case: 'It is said that Courts of Equity have decreed performance in cases where one party only was bound by the agreement. I believe it would be difficult to find a case where that has been done, particularly a late case. In the case of *Hatton v. Gray*, 2 Ch. Cas., it was considered as sufficient that the agreement should be signed by the party against whom the performance was sought, because such are the words of the Statute of Frauds; now, such certainly is the import, that no agreement shall be in force but when it is signed by the party to be charged; but the statute does not say that every agreement so signed shall be enforced; the statute is in the negative. But this *dictum* of Lord Redesdale, that an agreement signed by one party only, cannot be enforced against that party, is not law. Since this case in Schoales & Lefroy, it has frequently been otherwise decided. The Master of the Rolls, in 2 Jacob & Walker, 428, (*Martin v. Mitchell*), seems to think that the party who had signed, had a *locus penitentiae*, and was at liberty to recede until the other had signed, or in some manner made it binding upon himself. In the case of *Flight v. Bolland*, 4 Russ. 675, it was decided that an infant cannot sustain a suit for the specific performance of a contract, because the remedy is not mutual. But in *Clayton v. Ash-*

down, 2 Vin. 393, pl. 1, a specific performance (of a contract) made by an infant was decreed, on the ground that the infant had attained his full age, and had affirmed the contract before the bill was filed. In the cases already referred to, where the suits were maintained on agreements signed only by one party, it was, as was remarked by the Master of the Rolls, in 4 Russell, first because the Statute of Frauds only requires the agreement to be signed by the party to be charged; and next, it is said that the plaintiff by the act of filing the bill, has made the remedy mutual. From a review of all the authorities, it will appear to be an objection to decreeing a specific performance, that the parties are not mutually bound to fulfil it, and that the Court will not enforce such a contract, when the party who is not bound by the agreement, has taken an undue advantage of his position, to the injury of the other party. For instance, if an infant may make a contract mutual by affirming it after he comes of age; if the property is of a character subject to fluctuation in its value, the Court would not allow him to speculate upon his position, and take his own time to affirm the contract. A want of diligence might, under such circumstances, be sufficient ground for the Court's refusing its aid. To apply the rule to the case before us. This contract is mutual in its terms, and there is a mutuality of remedy to the parties. The one agrees to sell at a fixed price, and the other covenants to give it. If either party had died, the mutuality of remedy would not have been destroyed. The representatives of the deceased party would have been bound to fulfil the contract, or if Wilde had sold and assigned his interest, Tompkins could still have enforced the agreement against Wilde. But the moment Wilde's interest in this contract passed into the hands of his assignee in bankruptcy, all reciprocity as to the remedy was destroyed. I am not willing, however, to say, that the mere fact of the mutuality being destroyed under these circumstances, the Court, on that account should refuse its aid to enforce a specific performance. Such an application of the rule might contravene the policy of the bankrupt law, by depriving the creditors of a beneficial interest in a valuable part of the bankrupt's estate. But if the assignee, or a person holding under him, seeks a specific performance, he must affirm the contract and make it mutual, at least within a reasonable time. If he takes advantage of his position to speculate upon the opposite party, a Court of Equity will not encourage or aid him in such speculation. By the terms of the agreement in question,

Wilde was entitled to a conveyance of the property on his paying the consideration-money, at any time, on or before the 4th of February, 1846. The assignee came into the possession of the contract July 16, 1842. He took no steps towards assuming its responsibilities, or enforcing its fulfilment, but ten months afterwards sold at public auction all his right, title, and interest in it, to the complainant for three dollars and seventy-five cents. What was the relative situation of the complainant and the defendant all this time. Here was an agreement which the defendant could enforce against no one. It related to property, from its very character fluctuating in its value. Could the complainant rest upon his oars until February, 1846; then, if in the mean time the property doubled in value, demand it at his pleasure, of the defendant; or if it became valueless, be at liberty to cast it, a burden upon him, without any means of redress for such a wrong? And all this without any negligence, or want of foresight in the defendant. The contract was made before the bankrupt law was passed, and of course the defendant could not anticipate, and therefore did not provide against such a contingency. Would it be equitable under such circumstances, for this Court to countenance the complainant in taking advantage of his position, and in speculating upon the defendant; and more especially, when he risks only three dollars and seventy-five cents in the adventure. The complainant waited until the 7th of October, 1845, about four months before the time for executing the contract expired, and for more than three years after his purchase, and then formally tendered himself ready to assume its responsibilities. In the mean time the property increased some fifty per cent in value."

Upon the question of *jurisdiction*, (see Vol. I. p. 430,) it has been held, that the Court in New York may compel specific performance of a contract respecting lands in Illinois. *Newton v. Bronson*, 3 Kern. 587. Denio, C. J., says (p. 591): "The contract was for the purchase of lands lying in the State of Illinois, but the parties are residents of this State, and subject generally to the jurisdiction of its courts. The defendant's counsel insists that the Court below had no jurisdiction in such a case to decree a specific performance. It is not denied but that such a jurisdiction existed in the Court of Chancery, nor but that it passed to the Supreme Court by the provisions of the present constitution. That concession could not be avoided consist-

ently with a settled course of adjudication. (*Massie v. Watts*, 6 Cranch, 148; *Shattuck v. Cassidy*, 3 Edw. C. R. 152; *Ward v. Arredondo*, 1 Hopk. C. R. 213; *Mead v. Merritt*, 2 Paige, 402; *Mitchell v. Bunch*, Id. 606; *Sutphen v. Fowler*, 9 Id. 280.) The cases in the English Court of Chancery will be found referred to by Chancellor Walworth in the last of these cases. The doctrine thus established is, that this Court having jurisdiction of the person of the defendant, will, by its process of injunction and attachment, compel him to do justice, by the execution of such conveyances and assurances as will affect the title of the property in the jurisdiction within which it is situated."

A petition for specific performance, brought upon a bond for title, is demurrable, unless it allege a breach or non-performance of the condition. *Holman v. Criswell*, 13 Tex. 38. The Court remark (p. 42): "This action, if brought in Courts where there is a distinction between Law and Equity, would have been prosecuted in a Court of Equity. But there is no material difference, in substance, in the certainty with which the grounds of complaint must be set forth, whether the action be instituted in the one forum or the other. In Equity, the bill must state, not only the right, title, or claim of the plaintiff, with accuracy and clearness, but also the injury or grievance of which he complains, or in other words, in cases such as the one before the Court, the breach or non-performance of his obligations on the bond. In the nature of things, there can be no cause of action where no injury has been done. The invocation of the remedial aid of a Court necessarily presupposes the infliction of some wrong for which redress is sought, and this wrong must, as a matter of course, be stated in all Courts where the formality of pleading is required; and if it be not averred, no such case is made as entitles the complainant to the interposition of the Court.

"The only difficulty in holding that the averment of breach is in all cases an essential portion of the statement of the cause of action, consists in this, that in some cases, it is not incumbent on the plaintiff to prove the breach or non-performance of the contract or covenant. Its execution being established and its maturity passed, its breach will be presumed. As a general rule the plaintiff cannot be compelled to assert more facts than on a general denial he would be bound to prove. But the plaintiff must allege such facts, as would,

were they admitted to be true, entitle him to a judgment; and this certainly he could not demand, unless he complained that some wrong or injury had been done him, or that some right had been withheld."

In a bill for specific performance of a parol agreement, the defendant may rely upon the Statute of Frauds, though he admits the agreement. Otherwise, in case of such admission, where he does not insist upon the statute. *Dean v. Dean*, 1 Stockt. 425. (See Vol. I. p. 452.)

A decree for specific performance against a vendor is not a *judicial sale*, and a purchaser from either party is chargeable with notice of all involved in the suit, as a purchaser *pendente lite*. *Gilman v. Hamilton*, 16 Ill. 225. The Court say (p. 232): "It is true, as a general rule, that an innocent purchaser, without notice, under an erroneous, voidable, or even fraudulent decree or judgment, is entitled to protection, whether collaterally or directly attacked, by reversal or writ of error. This is a sound policy, and necessary for the assurance and protection of the public; for while the doctrine of *caveat emptor* applies to these sales as to the title of property, the risk should not be increased by including in it the validity of the decree or judgment against all allegations of error. Of course, no title can be derived through or under a void judgment or decree. Is Illinois College, or Coffin either, such a purchaser? And had they no notice? I am of opinion they were not. The bill did not seek a sale, and no sale was decreed; no sale was necessary to the full execution of that decree, and none was made under it. It was a simple transfer. There was no judicial sale or purchase, in the sense of the authorities on the subject. Where a bill is filed for specific performance by a transfer of land or property from vendor to vendee, a decree for that purpose is not a judicial sale; it is rather a specific execution of a former, than the making of a new sale; under such circumstances, any one purchasing from either party, is chargeable with notice of all that is involved in the suit, as a *lis pendens*, and its ultimate effects and consequences upon the property and the rights and powers of the parties. *Acc. Talbott v. Bell*, 5 B. Mon. 323; *Clary v. Marshall*, 4 Dana, 99; *DeWitt v. Foxworthy*, 9 B. Mon. 220; *Madison v. Hopkins*, 12, 600."

Vol. II. p. 1. *Action.—Title.—Mutuality, etc.*

It has been recently held, that, where one party is to make a deed and the other pay the purchase-money, an unconditional tender by the latter is not requisite. (See Vol. I. p. 35, Vol. II. pp. 55, 197.) An offer to pay and a demand of performance is sufficient, if performance is refused and the money brought into Court at the time of trial. More especially if in consequence of continued possession, an account of rents and profits is necessary, to determine what amount shall be tendered. *Henry v. Raiman*, 25 Penn. 354. The Court (p. 361) make the following distinction: "Where a debt is due on a contract *executed*, and the creditor is entitled to it without the performance of any thing on his part, an actual tender is required, and must be kept good by bringing the money into Court and pleading the tender, at an early stage of the cause, with an averment of '*tout temps prist.*' But this is not necessary where the agreement is *executory*, and the acts of the parties are to be concurrent; as where one is to make a deed and the other to pay the purchase-money. In such case an unconditional tender is not required. It is sufficient for the plaintiff, in order to put the opposite party in default, so that an action may be maintained, to show that he was *ready* and *willing* to pay the money, on receiving the consideration to which he is entitled."

Bill for specific performance. The plaintiff agreed with the defendant to buy certain land, pay therefor a certain sum of money, and perform certain work, within a specified time. The money was paid, but the work was not completed nor was there any offer to complete it, although the defendant did nothing to prevent it. Bill dismissed. *Denniston v. Coquillard*, 5 McL. 253. The Court say (p. 255): "This is not a case where compensation can be made for the failure to perform. Where a sum of money is to be paid, and there are no changes in the subject-matter of the contract, to prevent a specific execution of it, it may be decreed, and interest on the deferred payment is held to be a compensation for the delay. But in the case before us, if, by the nature of the contract, the dam and the race might be completed, after the expiration of the year extension, yet they must be completed before a conveyance of the land could be required. Courts of Equity can neither make contracts for parties

nor modify them, to suit the convenience and interest of one of the parties. It would be difficult, if not impracticable, to ascertain what damage Coquillard suffered by the non-performance of the complainants. He is shown to be insolvent, and this may have resulted from their failure. To obtain a specific performance, the individual seeking it must show vigilance on his part. He must prove that he has performed his contract, or offered to perform it, and was prevented by the defendant."

A vendor may require payment of the price before delivering the deed. *Salmon v. Hoffman*, 2 Cal. 138.

A purchaser by title-bond, evicted in consequence of his vendor's failing to pay the original vendor, may at any time recover the money paid by him. *Hurst v. Means*, 2 Sneed, 546.

Where a vendor was unable to make title to a part of the land which formed the principal inducement to the purchase; held, not a case for mere deduction from the price, but for entire rescission. *York v. Gregg*, 9 Tex. 85.

A vendee who pays part of the price, but refuses to complete the contract, forfeits the sum paid; and the vendor may recover the land. *Estes v. Browning*, 11 Tex. 237.

A vendee, retaining the bond for title and possession of the land, cannot resist payment of the price. *Lynch v. Baxter*, 4 Tex. 431.

In *Dwight v. Cutler*, 3 Mich. 575, upon the question how far a vendor is bound by his contract to convey a perfect title to the vendee, the Court say: "Such acceptance created an agreement between the parties by which the plaintiff simply engaged to sell, and the defendant to purchase the premises, on the terms specified, nothing being said about the title or the covenants which should be contained in the deed by which they should be conveyed. The plaintiff tendered a deed of the premises, with covenants against her own acts merely, which she claimed was a compliance with this contract. The defendant refused to receive this deed and execute a mortgage for the purchase money, on the ground, first, that as he alleged, the premises

were incumbered; and secondly, because the deed did not contain the usual covenants of seizin, against incumbrances, and of general warranty. No doubt the contract bound the plaintiff to make a good title. She agreed to sell the premises, not to execute a deed of whatever title she had to them. And in every contract for the sale of land, unless the contrary intention is expressed, there is an implied undertaking on the part of the vendor, available at law as well as in equity, while the contract remains executory, to make out a good title clear of all defects and incumbrances. (Rawle Co. for Tit. 430, *et seq.*; *Senter v. Drake*, 5 Barn. & Ad. 992; *Sharin v. Fickling*, 2 Rich. 361; *Breithaupt v. Thurmond*, 3 Ib. 216; *Creigh v. Shatto*, 9 Watts & Serg. 82; in the matter of *Humber*, 1 Ed. Ch. R. 1; *Hall v. Betty*, 4 Man. & Gr. 410; *Purvis v. Rayer*, 9 Price, 488; *Pomeroy v. Drury*, 14 Barb. S. C. R. 418; *Hunter v. O'Neil*, 12 Ala. 37; *Greenwood v. Ligon*, 10 S. & M. 615; *Owings v. Baldwin*, 8 Gill, 337.) It does not appear in the present case whether the plaintiff had a good title or not, but only that the defendant made certain objections to the title when a deed was tendered to him. The rule in England, where titles are not registered, unquestionably is, that the vendor in such a contract, in order to show performance, or an offer to perform on his part, whether in an action at law for the purchase-money, or in a suit in equity to compel specific performance, must prove affirmatively that he has a good title. But it would seem that in this country, where titles are recorded, and at all times open to the inspection of both parties, a different rule prevails. It has been assumed in many cases of actions by the vendor to recover the purchase money, (among others, see *Little v. Paddleford*, 13 N. H. 167, and *Feemster v. May*, 13 Sm. & Marsh. 272,) and was expressly decided in *Brethaupt v. Thurmond*, 3 Rich. S. Car. R. 216; *Brown v. Bellows*, 4 Pick. 179, 193, that the vendor might rely upon his tender of a deed without producing the evidence of his title, the burden being on the purchaser to show such a defect in the title as would justify him in refusing to accept the deed. See also *Espy v. Anderson*, 2 Harr. (Penn.) R. 308. We think this a safe, reasonable, and convenient rule, and in accordance with the general understanding of the profession in this country. And although there may be differences of opinion as to the ground on which it should be made to rest, we are inclined to adopt it, and to hold that in the absence of any finding to the contrary, we must assume that the plaintiff in this case

tendered a good title to the defendant. The only remaining inquiry under this head is, whether the deed tendered by the plaintiff containing covenants against her own acts only, was such as the contract required. We think it may be laid down as a general rule, that in every contract for the sale of lands, the vendor, unless he acts in a mere ministerial or fiduciary capacity, or there is something in the terms of the contract, or attendant circumstances, which shows a contrary intention, impliedly engages not merely as we have before said, to give a good title, but also to convey by a deed containing the usual covenants. This has always been the settled law in England, and we think is in accordance with the general understanding of the parties to such contracts. In England, the usual covenant of warranty on a conveyance of real estate is a covenant against the vendor's own acts merely, except in cases where the vendor does not claim by purchase in the popular signification of that term, in which case the covenant extends to the acts of the last person who thus claimed by purchase, and accordingly such limited covenant is there held sufficient. But as has been well said by Mr. Rawle in his recent work on Covenants for Title, (p. 559,) owing to various causes, the practice of conveyancing differs widely on the opposite sides of the Atlantic. It is obvious, moreover, that many of the usages of conveyancing which prevail where the state of society has for a long time been permanent, the titles old, and to a greater or less extent carefully examined at every purchase, lose their application in a comparatively new country. The same covenants which might satisfy a purchaser in England or Massachusetts, might not satisfy a purchaser in Texas or California. As precision of conveyancing increases with the steady rise of property, and as the titles become better known, a purchaser is less anxious for general covenants than where he buys in comparative ignorance of the title, and relies on such covenants for protection. Hence, the greatest difference will be found to exist between the law and practice on this point not only on the different sides of the Atlantic, but between different States. In Pennsylvania, the Supreme Court have laid it down as a general rule, that a purchaser has no right to expect covenants of greater scope than against the acts of the vendor and his heirs, and that an agreement to convey by warranty deed, means in popular phrase, a deed with special warranty. (*Witters v. Baird*, 7 Watts, 229; *Espy v. Anderson*, 2 Har. 312.) Mr. Rawle expresses the opinion that in the larger towns

of that State, such is the only express covenant for title usually inserted in conveyances. In Kentucky, it was held from an early day, to be both the settled rule and practice in that State, that unless where there was a special contract to the contrary, a covenant of general warranty must be given, and such seems still to be the rule. (*Fleming v. Harrison*, 2 Bibb, 171; *Vanada's Heirs v. Hopkins*, 1 J. J. Marsh. 293; *Hedges v. Kerr*, 4 B. Mon. 528.) So in Indiana, a bond conditioned 'for making a lawful title,' was held to require a general warranty. (*Clark v. Redman*, 1 Blackf. 379.) So where in Ohio it was said (*Tremaine v. Lining*, Wright, 644,) that 'a contract for a good and sufficient deed, means a deed with a covenant of warranty,' it is presumed that a general warranty is meant. So in Virginia, it was held in *Rucker v. Lowther*, (6 Leigh, 259,) that where L., attorney for C., covenanted to sell and convey land to B. according to a power of attorney given him by C.; this was a covenant for a conveyance by C. with general warranty, unless the power of attorney referred to in the covenant, confined the attorney to a special warranty, and it was shown to the purchaser at the time of the contract, or its contents fairly and fully stated to him. But see *Pennington v. Hanley*, 4 Munf. 140; *Fuller v. Hubbard*, 6 Cow. 13. No doubt it is the general usage in this State, and probably in most of the Western States, to convey land by deeds containing the covenant of general warranty, upon the principle that an agreement to convey, where there is nothing to show a contrary intention, gives a right to the usual covenants for title. We think the plaintiff was bound in the present case to convey by a deed containing a general warranty; and that the conveyance tendered, which contained a covenant against her own acts merely, was not a compliance with her contract."

Vol. II. p. 97. *Use and Occupation.*

Bond to convey certain premises to the plaintiff, upon payment by him of a note on demand, and interest quarterly, and in the mean time allow him, his heirs, and assigns, the peaceable and quiet posses-

sion of the premises, until said conveyance should be made. The plaintiff regularly paid interest on the note as it fell due, and both parties treated the payment as rent; and the principal had never been demanded by the obligor, nor paid. In an action of trespass for removing the plaintiff from the premises, the defendants justified under a deed from the obligor subsequent to the bond, and a notice to the plaintiff before the act complained of. Held, the action was maintainable. Metcalf, J., says (in substance): "The legal effect of the condition of the bond was a demise of the premises, so long as he should pay the interest quarterly and should not fail to pay the principal on demand. His rights under the demise continued at the time of Brown's conveyance of the premises to the defendants. Not being tenant at will, when that conveyance was made, his tenancy was not thereby terminated." *White v. Livingston*, 10 Cush. 259.

Where a sale is rescinded, the vendee is not liable as a lessee, but only for the amount to which he has been benefited by occupying that part of the land which belonged to the vendor; allowance being made for improvements, including those made on land by mistake, represented to have been conveyed to him. *Coffman v. Huck*, 19 Mis. 435. The Court say (p. 440): "The weight of the English and American authority is, that when one takes possession under a contract to convey, he does not thereby create the relation of landlord and tenant between the vendor and himself, and that an action for use and occupation will not lie against him, until there has been an abandonment of the contract. But this principle does not apply here. This is a much stronger case. Here the land was actually conveyed. The defendant can only be held liable to the amount that he has been benefited by the occupation, as he has not paid the purchase-money, and not for what a single witness may say was the annual value of the premises. By such a process, the plaintiffs, in a short time, taking advantage of their own refusal to rescind a contract, which the judgment in this case assumes ought to have been rescinded, would have received the price of the land, and then have taken the land itself."

Assumpsit for use and occupation, or the process of forcible detainer, does not lie against one who has acquired possession under a contract of sale which he refuses to execute. *McNair v. Schwartz*,

16 Illin. 24; *Dixon v. Haley*, Ib. 145. Nor against a vendor who remains in possession. *Greenup v. Verner*, 16 Illin. 26.

A contract of sale, giving the vendee a right to enter and occupy till default in payment of the price, without reservation of rent or limitation of time, is a license, and not a lease. Hence, upon breach of contract, the vendor may enter without notice or demand of possession. *Stone v. Sprague*, 20 Barb. 509.

In *Dwight v. Cutler*, 3 Mich. 566, the defendant made proposals to an agent of the plaintiff for the purchase of lands, and a parol agreement was made, that, if the plaintiff accepted the proposals, a deed should be given as soon as was convenient; whereupon the defendant, by permission, took possession. The plaintiff affirmed the contract, executed and tendered a deed, which the defendant refused, for want of covenants of warranty. The defendant having occupied nine months, and all negotiations between the parties ceased, the agent notified him that if he continued to occupy he must pay rent. He afterwards remained in possession fifteen months. Held, he was liable to pay rent for the fifteen months, but not for the previous nine months, the plaintiff having been bound to give a deed with covenants, and the failure to consummate the sale having therefore been attributable to his fault. The Court give the following view of the course of decisions upon this subject: "On the defendant's first entry into the possession of the premises, he became the tenant at will of the plaintiff. (*Gould v. Thompson*, 4 Metc. 224; *Ball v. Cullimore*, 2 Cr. M. & R. 120; *Right v. Beard*, 13 East, 210; 1 Mees. & W. 700; *Doe v. Jackson*, 1 B. & C. 455; *Doe v. Chamberlaine*, 5 Ib. 14; *Doe v. Caperton*, 9 Carr. & Payne, 112; *Kirk v. Taylor's Heirs*, 8 B. Mon. 262.) And during the continuance of his possession, nothing appears to have been done by either of the parties to determine the tenancy. His occupation having been beneficial to him, that is a sufficient ground to imply a promise to pay a reasonable sum by way of compensation for such occupancy, unless there is something in the circumstances inconsistent with the notion of such a promise, or of an obligation to pay. We are all clearly of opinion that the plaintiff is entitled to recover for the use of the premises during the fifteen months they were occupied by the defendant, after all negotiation for the purchase was at an end, and he was notified that if he continued

in possession any longer, he must pay rent. To this extent, *Howard v. Shaw*, 8 M. & W. 118, is directly in point to sustain the present action. There a party who had been let into possession under a valid contract of purchase which was afterwards abandoned, was held liable to an action for use and occupation at the suit of the vendor for the period during which he continued in possession after the abandonment of the contract, *Alderson, B.*, saying: 'While the defendant was in possession under the contract of sale, he was a tenant at will under a distinct stipulation that he should be rent free; therefore, for that time, no action for use and occupation can be brought against him; but when that contract is at an end, he is a tenant at will simply; therefore, from that time he is to pay for the occupation.' See also *Osgood v. Dewey*, 13 T. R. 240. In the present case, there never was a valid contract of purchase. If the minds of the parties can be said ever to have met, their agreement was by parol, merely, and void under the Statute of Frauds, and there had been no such part-performance as gave either of them a right to enforce it in equity. When, therefore, the defendant refused to accept the deed tendered, and the plaintiff to execute any other, the parties stood in respect to the subsequent occupation, in the same relation to each other as though a valid agreement had been made and afterwards abandoned.

"As to whether the defendant is liable for the first nine months of his occupancy, we have entertained more doubt. He was admitted into possession by the plaintiff's agent, on his making a proposition to purchase, and under the expectation that this proposition would be accepted by the plaintiff, when made known to her, and a conveyance executed accordingly. The circumstances clearly repel any presumption of a promise by the defendant to pay for his occupation pending the negotiations for the purchase, *in the event* of the plaintiff's refusal to accept his proposition, or having accepted it, her subsequent failure to perform on her part. (*Winterbottom v. Ingham*, 7 Ad. & Ell. 611; *Hough v. Birge*, 11 Verm. 190; *Johnson v. Beauchamp*, 9 Dana, 124; *Kirtland v. Pounsett*, 2 Taun. 145.) But it is manifestly just that the plaintiff should have compensation for such occupation, *in the event* of a failure in the consummation of the sale, occasioned by the defendant's refusal to perform on his part. Upon the principle before stated, a promise to pay for such occupation in such event, may fairly be implied. If this view is not fully sustained by *Hull v. Vaughan*, (6 Price, 157,) the comments of Lord Denman, in *Winter-*

bottom *v. Ingham*, (7 Ad. & Ell. 611,) show that it is not in conflict with the English decisions. It is sustained by the recent case of *Smith v. Wooding*, (20 Ala. R. 324,) in which a vendee, who had entered into possession under a parol contract of purchase, and after remaining in possession for twelve months, refused to pay the purchase money and abandoned the premises, was held liable to the vendor, he not being in fault, for the use and occupation of the land during the time he so held it. And it would seem also to be sanctioned by *Gould v. Thompson*, (4 Mete. 224.) If such promise could be implied in such a case where the sole cause of the failure to consummate the sale was the plaintiff's inability to convey, occasioned by inevitable accident; surely it may be where such failure is caused by the defendant's own default or refusal to accept a conveyance and perform on his part. It is believed that this view is not in conflict with *Vanderhewill v. Storrs*, (3 Conn. 203,) and *Smith v. Stewart*, (6 J. R. 46,) which may be regarded as sustaining the doctrine that where there has been a contract to purchase, valid at law, as in the former case, or enforceable in equity on the ground of part performance, as in the latter, under which the vendee has entered and occupied, the vendor cannot maintain assumpsit for such occupation while the contract, though unperformed, is yet unrescinded and in full force; for, in the present case, as we have already said, there was no such contract. If this view is correct, the plaintiff is entitled to recover in the present action for the first nine months of the defendant's occupancy, if it appears that she accepted the defendant's proposition to purchase, and offered to perform on her part, but not otherwise. The case finds that the proposition was accepted. Such acceptance created an agreement between the parties by which the plaintiff simply engaged to sell, and the defendant to purchase the premises, on the terms specified, nothing being said about the title or covenants." The Court then proceeded to determine that the defendant was not liable, because a deed *with covenants* was not tendered.

Vol. II. p. 105. *Damages.*

It has been held in Rhode Island, that in an action on a contract to convey land, the measure of damages is the excess of the value of the land at the time of breach over the agreed price, and evidence is admissible of such value at and about, before and after the time; the limits as to time being within the reasonable discretion of the Court. The admission of evidence as to sales from June, the time of breach, to the following March, was held not to be ground of new trial. *Barbour v. Nichols*, 3 R. I. 187.

Vol. II. p. 180. *Parties.*

Bond by a married woman for the price of land. An action at law having been brought upon the bond, and successfully resisted on the ground of coverture; held, eight years after it became due, a bill in equity could not be maintained upon it. *Todd's Appeal*, 24 Penn. 429. The Court say (p. 431): "The delay is explained by telling us that the plaintiff attempted several other remedies, and failed; but this does not appear in the case, and besides, a mistake in the remedy does not prevent the running of the statute. It would be very strange if a debt, secured in proper legal form, should be barred by lapse of time, and one that is entirely informal should not be. Yet even this might be where there is actual fraud in the debtor to conceal the defect; but there is nothing of that here. If the plaintiff ever had a right to this form of relief, it is now barred by the principle of the Statute of Limitations."

With regard to the effect of *an assignment* of a contract for the sale and purchase of land upon the respective rights of the parties, the following case recently occurred in Massachusetts. The defendant gave to the plaintiff a bond, conditioned that "he, his heirs and assigns shall convey" (certain real estate to the plaintiff) "his heirs and assigns, provided" (the plaintiff) "his heirs and assigns shall pay" (the defendant, his heirs and assigns a certain sum.) The bond

having been assigned, the assignee tendered the sum mentioned to the defendant, who had previously conveyed the land to a third person. Held, an action was maintainable on the bond. *Harrington v. Barnes*, 10 Cush. 106. Metcalf, J., says (p. 108): "The first part of the condition is, that the defendant, his heirs and assigns, shall convey certain land. The words "heirs and assigns" are here inoperative; because a subsequent part of the condition is, that the land shall be conveyed by a deed executed and acknowledged by the defendant himself. The condition also is, that the defendant shall convey the land to the plaintiff himself, and not that he shall, on any contingency, convey it to any one else. The words are 'shall convey, &c., to &c., his heirs and assigns forever.' These last words do not legally mean that the defendant shall convey the land to the plaintiff, or to his heirs or assigns, but that he shall convey to the plaintiff an estate in fee-simple; those words in a deed being necessary to convey such an estate. The condition furthermore is, that such conveyance shall be made by the defendant to the plaintiff, provided 'the said plaintiff, his heirs and assigns, shall first pay to said' defendant, 'his, heirs, executors, administrators, or assigns, the sum of \$300.' The words 'heirs,' &c., can have no operation, and must be treated as insensible surplusage. The word 'assigns' is also inoperative, unless it means something different from heirs, executors, or administrators. But the plaintiff's assigns may mean his assignee of the bond, and it can have no other operative meaning. We must, therefore, hold that it means him. The payment then was to be made by the plaintiff, *or*, by the person to whom he should assign the bond, and was to be made to the defendant alone, if no operative meaning can be given to the words 'his assigns,' *or*, to his assignee of the land, if such is the meaning of those words. And as the case finds that Barker was the plaintiff's assignee of the bond, and that he seasonably tendered the money to the defendant, the terms of the condition respecting payment have been complied with. We need not decide whether any tender was necessary after the defendant conveyed the land to Goffe. A deed given by the defendant, after that conveyance, would not have been a performance of the condition of the bond, unless he had first procured a conveyance of the land to himself, from Cutting. For the condition was, not merely that the defendant should execute and acknowledge a quit-claim deed of the land, but that he should 'convey' it by such a deed."

A vendee, who becomes the administrator of the vendor, may have relief in a suit against the widow and heirs, whether the succession is open or not. His claim is not wholly in the nature of a money demand, requiring to be presented to the administrator. *Robinson v. M'Donald*, 11 Tex. 385.

Vol. II. p. 216. *Sales by Order of Court.*

Courts of Equity have a general supervision over sales decreed by them, to be exercised by bill, petition, or motion. *Coffey v. Coffey*, 16 Ill. 141.

The purchaser of property, sold under a decree of Chancery, becomes a *quasi* party to the cause, so far as relates to the rights and duties properly appertaining to such purchase. Hence, if he fails to pay the purchase-money or any part of it, when due, the Court may, on motion and without notice, enter judgment and award execution against him for that amount. *Blackmore v. Barker*, 2 Swan, 340.

The sale of land by the Master, under a Chancery decree, is not complete, till confirmation of his report of the sale. Before such confirmation ; on petition of a creditor, proof of sale at an undervalue, for the benefit of the debtor, and an agreement by the creditor to make a reasonable advance upon the sum bid ; the Court may open the biddings. *Childress v. Hurt*, 2 Swan, 487.

Under a license, on petition, to sell 172 acres owned in common, in part by married women and infants, for division, the sale took place and was confirmed, and the last payment made, but afterwards, prior to the final decree, it was discovered that the tract contained about twenty acres more than both parties supposed. Upon petition for payment for the surplus, or to set aside the sale at the option of the purchaser ; held, he should be required to pay for the surplus at the same rate as for the 172 acres. *Horn v. Denton*, 2 Sneed, 125.

A purchaser at a sale under a decree in a suit for partition will not be attached for refusal to pay the purchase-money, until after an order to pay it. *Cowell v. Lippitt*, 3 R. I. 92.

It has been recently held in Maryland, that Chancery sales are made subject to all incumbrances, and the rule of *caveat emptor* applies, in the absence of a contrary agreement proved by the purchaser. *Farmers, &c. v. Martin*, 7 Md. 342.

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